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CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE

AND
THE GENERAL CIVIL PRACTICE

OF THE
STATE OF NEW YORK

REPORTED WITH NOTES

BY
PERCIVAL S. MENKEN, PH. D., LL. B.

OF THE NEW YORK BAR, AND EDITOR OF NEW YORK LAW RECORD

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CON-
STRUCTED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS,
ISSUED DURING THE PERIOD COVERED BY THIS VOLUME; NEW
YORK REPORTS, VOLS. 170-173 INCLUSIVE; APPELLATE
DIVISION REPORTS, VOLS. 69-80 INCLUSIVE;
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CIVIL PROCEDURE REPORTS.

CLEMENS v. AMERICAN FIRE INSURANCE COMPANY OF PHILADELPHIA.

SUPREME COURT—APPELLATE DIVISION—FOURTH DE-
PARTMENT—MARCH, 1902.

§ 533.

*Fire Policy—Conditions Precedent—Proofs of Loss—Insufficiency of
Complaint.*

In an action on a fire policy, an allegation in the complaint that plaintiff filed a complete inventory of the property destroyed and injured, with the quantity and cost of each article and amount claimed thereon, which inventory ever since had been and still was in the possession of the company, was not sufficient, as a specific allegation that the requisite proofs of loss were filed, where a copy of the policy was annexed and specified in detail what the proofs of loss should contain, and the inventory alleged failed materially to comply with such requirements.

The defect was not cured by the general allegation under Code of Civil Procedure, section 533, which provides that in pleading the performance of a condition precedent it is not necessary to state the facts constituting performance, but the party may state generally that he has "duly performed all the conditions;" the word "duly" being omitted.

An allegation that sixty days had elapsed after proofs of loss were received by defendants before the action was commenced was necessary, where the policy specifically provided that the loss should not be payable until after sixty days, and that no suit should be sustainable until full compliance with all the requirements of the policy.

(Decided March, 1902.)

Appeal from Special Term, Erie county.

Clemens v. American Fire Insurance Company of Philadelphia.

Action by John Clemens against the American Fire Insurance Company of Philadelphia, Pa. Judgment sustaining a demurrer to the complaint, and plaintiff appeals. Affirmed.

Phillip V. Fennelly, for appellant.

Seward A. Simons, for respondent.

WILLIAMS, J.—The judgment appealed from should be affirmed, with costs.

The action was brought upon a policy of insurance to recover for the loss of household furniture destroyed by fire. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The particular points made were (1) that there was no sufficient allegation of the rendering of proofs of loss to the defendant pursuant to the terms of the policy; (2) that there was no allegation that sixty days had elapsed after the proofs of loss were received by the defendant before the action was commenced. These were conditions precedent to a right to recover in the action.

There was no specific allegation as to rendering proofs of loss, except that the plaintiff filed a complete inventory of the property destroyed and injured, with the quantity and cost of each article, and the amount claimed thereon, which inventory ever since had been, and still was, in the possession of the defendant. The policy, a copy of which was annexed to the complaint, specified in detail what the proofs of loss should contain, and the inventory alleged failed very materially to comply with the provision of the policy. It failed to furnish anything like the amount of information required by the specifications as to the proofs of loss. If it had been alleged that this inventory was rendered as the proofs of loss, and that it had been re-

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ceived and retained by the defendant without objection, and that the defendant had required no further or other proofs of loss to be furnished, it might have been sufficient. But the allegation of the complaint fell far short of this. It was manifestly insufficient as a specific allegation and performance of this condition precedent to the right to recover. Nor was this defect cured by the general allegation under section 533, Code Civ. Pro., which provides:

“In pleading the performance of a condition precedent in a contract it is not necessary to state the facts constituting performance; but the party may state generally that he or the person whom he represents duly performed all the conditions on his part. If that allegation is controverted he must, on the trial, establish performance.”

The word “duly” was omitted from the complaint, and there was, therefore, a failure to comply with the section quoted, and plaintiff was entitled to no benefit thereunder. The word “duly” in this and other like provisions of the Code has been held to be one of substance, and not of form, merely (*Les Successeurs D'Arles v. Freedman*, 53 N. Y. Super. Ct. 519; *Baxter v. Lancaster*, 58 App. Div. 380, 68 N. Y. Supp. 1092; *People v. Bacon*, 37 App. Div. 414, 55 N. Y. Supp. 1045; *Tuttle v. Robinson*, 91 Hun, 189, 36 N. Y. Supp. 346; *Brownell v. Town of Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685).

There was no allegation in the complaint that sixty days had elapsed since the proofs of loss were received by the defendant, before the action was commenced. Such an allegation was necessary (*Porter v. Kingsbury*, 5 Hun, 598; *id.*, 71 N. Y. 588; *Reining v. City of Buffalo*, 102 N. Y. 312, 6 N. E. 792). In the first case it was held that a complaint in an action upon an undertaking upon appeal given pursuant to section 348 of the

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old Code, which failed to allege service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from ten days before the commencement of the action, was defective; that the notice was a condition precedent to the commencement of the action, and in the absence of the allegation the complaint did not state a cause of action. The Code prohibited the commencement of the action until ten days after the service of the notice. In the other case it was held necessary to allege in the complaint in an action against the city for a tort the presentation of the claim to the common council, and the expiration of forty days thereafter before the commencement of the action; that the provision of the charter requiring such presentation of claim, and prohibiting the bringing of the action until forty days had elapsed, created a condition precedent. The court there said, in referring to *Porter v. Kingsbury*:

“There the act required to be performed constituted no part of the cause of action, but was provided, as in this case, to shield the parties liable from cost and trouble, in case of their willingness to pay the claim without suit, after notice given. It is immaterial whether the condition be imposed in the statute giving the right of action, or be provided by contract, or exists by some principle of common or statute law; the complaint must, by the settled rules of pleading, state every fact essential to the cause of action, as well as those necessary to give the court jurisdiction to entertain the particular proceeding.”

In the case we are considering it was specifically provided by the policy that the loss should not become payable until sixty days after proofs of loss were received by the company, and that no suit should be sustainable upon any claim until after full compliance with all require-

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ments in the policy. The rule laid down in the cases cited is applicable to this case.

The views here expressed lead to the conclusion that the judgment should be affirmed, with costs.

Interlocutory judgment affirmed, with costs, with leave to plaintiff to plead over upon payment of costs in court below and upon this appeal within twenty days.

All concur.

Note on Section 533, Code of Civil Procedure—What is Sufficient Allegation in Complaint.—In an action brought upon a policy of life insurance, the plaintiff alleged: "That up to and at the time of the death of the said Henry D. Ahlsen all obligations and conditions forming the consideration for which the defendant issued said policy and made said contract and agreement were fully performed on the part of the plaintiff herein." Upon demurrer, held good. Says the court, "An averment by the plaintiff that he has fully and faithfully performed all and singular the covenants, etc., on his part is an averment that everything was done which he was bound to do or cause to be done and was a sufficient allegation under the section that conditions precedent were duly performed, citing *Rowland v. Phalen*, 1 Bosworth, 43; *Ragsdale v. Green*, 28 Civ. P. 226, when controverted must be established by proof on the trial. *Nat. Wall P. Co. v. A. M. Mut.*, 60 App. Div. 224.

The Word "Duly" Must Be Used.—Where the word *duly* is omitted from the complaint there is a failure to comply with the section and plaintiff is entitled to no benefit under it.

The word *duly* in this instance is held to be a word of substance and not of form merely. *Clemens v. Am. Fire Ins. Co.*, 70 App. Div. 436; *Successeurs D'Arles v. Freedman*, 53 N. Y. Super. Ct. 519; *Baxter v. Lancaster*, 58 App. Div. 380; *People ex rel. Batchelor v. Bacon*, 37 App. Div. 414; *Tuttle v. Robinson*, 91 Hun, 187, 189; *Brownell v. Town of Greenwich*, 114 N. Y. 518; *Hunt v. Dutcher*, 13 How. Pr. 538.

What is a Condition Precedent.—This depends not upon technical words but upon the plain intention of the parties to be deducted from the whole instrument. *Ketchum v. Belding*, 58 App. Div. 298; *Roberts v. Brett*, 11 H. of L. Cas. 337.

Application of Section.—The section applies not only to all contracts in which a condition precedent is expressed, but also to those instruments from which a condition precedent is to be implied as a

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matter of law. *Adams v. Sherrill*, 14 How. Pr. 297; *Chem. Nat. Bk. v. Carpenter*, 9 Abb. N. C. 301.

Other Authorities.—For a further collection of authorities both within and without the State, see *Abbott's Trial Brief on the Pleadings*, sec. 179, p. 159 to sec. 186, p. 168, Edition of 1891.

JOHANNA KALISH ET AL., AS EXECUTRICES;
JULIUS KALISH ET AL., AS EXECUTORS OF
THE LAST WILL AND TESTAMENT OF
JOSEPH KALISH, DECEASED, RESPOND-
ENTS, *v.* LUKE HIGGINS ET AL., APPEL-
LANTS.

SUPREME COURT—APPELLATE DIVISION—FIRST DE-
PARTMENT—MARCH, 1902.

§ 1022.

Judgment Setting Aside a Deed as Fraudulent Reversed—No Evidence to Support Finding of Fraud or Fraudulent Intent.

In an action brought by judgment creditors of a husband to set aside a deed made by him to his wife for a nominal consideration while he was guarantor of a lease, the doctrine applied that a person has a right to give away his property as he pleases and that such a gift is not invalid because he subsequently becomes insolvent. *Kain v. Larkin* (131 N. Y. 307), approved; *Citizens' National Bank v. Fonda* (18 Misc. 114), distinguished.

The party assailing such a conveyance assumes the burden of showing that it was executed in bad faith and that it left the grantor insolvent and without ample property to pay his existing debts.

Declarations made by the grantor after the conveyance are not evidence as against the grantee to show fraud in the transaction. (*Decided March, 1902.*)

Johanna and Julius Kalish et al. v. Luke Higgins.

Appeal from judgment entered upon decision of the court at Special Term.

M. J. Horan, for appellants.

Edward W. S. Johnson, for respondents.

INGRAHAM, J.—The plaintiffs, as judgment creditors of the defendant, Luke Higgins, seek to set aside a deed made by Higgins, conveying certain real estate to his wife, Elizabeth Higgins, for a nominal consideration. The complaint alleges the conveyance of the property sought to be reached in this action on the 5th day of August, 1896, and the recovery of judgment against the defendants on the 18th day of October, 1898; that on the 19th day of February, 1892, and the 14th day of June, 1894, when the instruments upon which the judgment against the defendant, Luke Higgins, were obtained were executed, Higgins represented to the plaintiffs' testator that he was the owner and seized in fee of the premises described, and that the said plaintiffs' testator accepted the obligation of the defendant as surety, relying upon the said representations and statements; that the conveyance by the defendant, Luke Higgins, to his wife was made for the purpose of preventing judgments against Higgins from becoming a lien on said premises, and were made solely for the purpose of hindering, delaying and defrauding the plaintiffs' testator and other creditors of the defendant, Luke Higgins; that the defendant, Luke Higgins, is wholly insolvent and has no other property or assets out of which said judgment or any part thereof can be collected, and that unless the court grants the relief sought in this action the plaintiffs will be remediless. There is no allegation in the complaint that at the time

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of this conveyance of the property the judgment debtor was not solvent, or that he did not retain property sufficient to pay all his debts.

The court in its decision, which was a short decision under section 1022 of the Code, found that "at that time (time of conveyance) he (defendant Luke Higgins) did not have left enough property to meet his said obligations under his contract of guaranty." There was no allegation in the complaint of this fact, and not only is there no evidence to sustain this finding, but it is disproved by the undisputed testimony.

The decision further contains a statement that "the court decides that the aforesaid conveyances were made by defendant, Luke Higgins, with the intent to hinder, delay and defraud the plaintiffs' testator and plaintiffs, within the meaning of said statute." We think that the testimony did not justify this finding, and that there was no evidence to show that this defendant was at the time of making this conveyance insolvent. In the opinion of the court below the decision was based upon the case of *Citizens' Nat. Bank v. Fonda*, 18 Misc. 114, but in that case it appeared that the conveyance sought to be impeached was voluntary and included all of the debtor's property, so that there was not enough left to pay his debts, the court in that case saying: "The conveyance in question being voluntary, without consideration, and covering substantially all of the property of the judgment debtor so that there is nothing left out of which the plaintiff can collect its judgment, is presumptively fraudulent, for the plaintiff at the time the conveyance was made was a creditor." This certainly was not an authority for a case in which not only that crucial fact was proved, but where the uncontradicted evidence showed that at the time of the conveyance sought to be impeached the judgment

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debtor retained property much in excess of his actual indebtedness, and much in excess of the claim which subsequently he became bound to pay.

The facts surrounding this transaction show that at the time this conveyance was made neither the judgment debtor nor the grantee had an intention to defraud anyone. The plaintiffs' testator, being the owner of a piece of real estate, leased it on February 19, 1892, to one Manning for a term of five years from May 1, 1892, to May 1, 1897, at an annual rental of \$1,560, payable monthly in advance, and the defendant, Luke Higgins, guaranteed the payment of that rent. This lease contained a covenant against the assignment of the lease. On the 21st day of June, 1894, the tenant, wishing to transfer the lease, applied to the plaintiffs' testator for permission to make such transfer; whereupon the landlord consented to an assignment of the lease from Manning to one Reilly, and at the same time covenanted to give a further term of two years to commence on the 1st of May, 1897, upon the same terms and conditions as the existing lease, either to Manning or to Reilly, and at that time the defendant, Higgins, executed an agreement whereby he agreed to remain liable on said lease, regardless of such assignment, for any default made by either Manning or Reilly during the remainder of the term, and further agreed that, if default should be made by Manning or Reilly in the payment of the rent and the performance of the covenants contained within the lease or the renewal thereof which the plaintiffs' testator had that day covenanted to and with said Manning and said Reilly to grant at the expiration of the time of the within lease, he would pay the rent mentioned in said lease or renewal, or any arrears thereof that might remain due to the plaintiff's testator. This instrument was executed on the 14th day of June, 1894.

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At that time Higgins was again asked whether he was the owner of the property the conveyance of which is sought to be set aside in this action, and he stated that he was. But there was no agreement or covenant or undertaking that he would remain the owner of the premises, or that the premises should be subject to any lien for the performance of this agreement. It appears that all of the rent under the original lease was paid, and that neither the lessors or Higgins made any default in the payment of such rent. Higgins, being engaged as a saloonkeeper in the city of New York, became ill, and in August, 1896, desired to convey the premises in question to his wife. He went to the office of Messrs. Johnston & Johnston, who were the attorneys for the plaintiffs' testator, and had prepared the lease from Manning, the consent for the assignment of the lease from Manning to Reilly, and the instrument by which the defendant guaranteed the payment of the rent and requested them to draw up the papers for a transfer of this property from himself to his wife. The deeds making these transfers were drawn up in the office of Johnston & Johnston and recorded by them. This conveyance was, therefore, made under the direction of the attorneys for the lessor, in whose presence Higgins had stated that he was the owner of the property, and at the time these conveyances were made there was no rent due under this lease to the plaintiffs' testator, and none became due which was not paid by the tenant for several years thereafter.

There is no evidence that at the time this conveyance was made Higgins was indebted to any person in any sum of money. Higgins was called as a witness and testified that at the time he did not owe anybody one cent. There was a contingent liability to the plaintiffs' testator under this guaranty for the rent, but no rent was then due and

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unpaid, and there is no evidence that either of the parties to this action contemplated that there ever would be any rent due or unpaid, or that this conveyance had any relation to any liability under that guaranty. Both the defendant and his wife positively swear that they had no suspicion that any liability would subsequently arise because of this guaranty, and there is no evidence to contradict that statement. It is corroborated by the fact that the defendant went to the attorneys for the lessor to have drawn up the conveyance to effect the transfer. Nor at this time had either Reilly or Manning accepted the renewal of the lease or agreed to accept such a renewal. After these transfers were made and duly recorded Higgins continued in business, being apparently prosperous. He had an account in the Greenwich Bank, and that account continued until after May 3, 1898, the balance upon the date of this conveyance being more than \$100, afterwards increasing, so that at one time he had over \$3,500 on deposit in the bank; and from January 12, 1897, to March 24, 1898, he apparently had in this bank at all times a sum of money in excess of that required to pay the amount unpaid for the rent upon this lease, the payment of which he had guaranteed. In addition to this Higgins continued to conduct his business, giving orders for supplies, and promptly paid his bills. In November, 1897, he sold out this business and received the consideration therefor.

On the 15th day of April, 1897, Reilly, the person to whom the lease made to the plaintiffs' testator had been assigned, served a notice upon the plaintiffs' testator that he elected to take a renewal of the lease for two years, to commence May 1, 1897, and subsequent to that a renewal lease was executed between Reilly and the plaintiffs' testator, but there is no evidence that the defendants had

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notice of those facts. Reilly continued in these premises under this renewal lease, and during the time he occupied the premises he paid all the rent that accrued. Before the expiration of the two years, however, he left the premises, leaving unpaid the sum of \$86 as rent of the premises for the month of June, 1898, and the sum of \$130, the rent of said premises due on the 1st day of July, 1898, making a total of \$216, and for that sum the plaintiffs' testator obtained a judgment against Higgins, which judgment was entered on October 18, 1898, and it is to enforce payment of this indebtedness, accrued nearly two years after the transfer of the property upon a lease executed nearly a year after the transfer of the property—it being the only unpaid obligation of the defendant either actual or contingent at the time he made the transfer—that such transfer is sought to be set aside. These facts are all undisputed, with nothing secret about the conveyance, which was made under conditions which showed that it was not intended to conceal it when made, and when there was no rent due the plaintiff and no lease then in existence upon which the defendant could at any time be liable.

To say that the execution of an instrument under those circumstances was fraudulent would make every conveyance fraudulent made after a man had signed a guaranty which was to continue for several years. If any legal proposition is settled, it is that a person has a right to give away his property as he pleases, and that such a gift is not invalid because he subsequently becomes insolvent and unable to pay his debts. As was said by Judge Earl in *Kain v. Larkin*, 131 N. Y. 307: "By the express terms of the statute, it is not sufficient to condemn a conveyance of land as a fraud upon creditors that it was not founded on a valuable consideration. A person assailing

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such a conveyance must go further and show by other evidence that it was made with the fraudulent intent condemned in the statute. An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors; and when a judgment creditor assails a conveyance made by the judgment debtor he cannot cast upon the grantee the *onus* of showing good faith and of establishing that the grantor was solvent after the conveyance by simply showing that the deed was not founded upon a valuable consideration. But the person assailing the deed assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities; and so it has been repeatedly held." This opinion but reiterates a rule that has always been the law as shown by the authorities cited. If this is the law, then, upon the facts stated, there is no justification for a finding that this conveyance defrauded the plaintiffs, or anyone, or was made with such an intent; and the burden of proof being upon the plaintiffs to show the fraudulent intent, and there being no evidence to show such intent, the finding of the trial judge of such an intent is unsupported by the evidence.

There are several rulings upon questions of evidence which it is not necessary for us to consider upon this appeal, as a new trial must be ordered. It is proper, however, to call attention to the fact that the declarations of Luke Higgins, the grantor, made after the conveyance, are not evidence as against Elizabeth Higgins, the grantee,

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to show fraud in the transaction; nor would the fact that one of the defendants, was called as a witness and testified to facts which are inconsistent with a fraudulent intent, and that the court refused to believe his testimony, be evidence from which the court could find a fraudulent intent.

We think the evidence in this case was entirely insufficient to justify a finding of any fraudulent intent as to either of the parties to the conveyances, and for that reason the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concur.

AUGUSTA G. GENET, APPELLANT, v. THE
PRESIDENT, ETC., OF THE DELAWARE &
HUDSON CANAL COMPANY, RESPONDENTS.

COURT OF APPEALS—APRIL, 1902.

§§ 1022, 1209.

Judgment roll. Competency as evidence in bar to subsequent action.

A judgment roll, in a former action, is not competent evidence in bar to a subsequent action between the same parties, when the judgment in the earlier action does not expressly declare that it was rendered upon the merits, or it does not so appear in the judgment roll. It is not sufficient, in order to constitute a bar, that it may be inferred, merely, from the record that the judgment was entered upon the merits, or that it so appears from papers in the case outside the judgment roll (Code Civ. Pro., sec. 1209).

(Decided April, 1902.)

Appeal from a judgment of the Appellate Division, First Department, affirming a judgment of the Special Term dismissing the complaint.

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This is the sixth action between the same parties that has come to this court, all of them arising out of a contract for the mining of coal on certain lands located at Scranton, in the State of Pennsylvania.

The plaintiff and her husband, George C. Genet, are described as parties of the first part in this contract, and the defendants as parties of the second part. The instrument bears date March 28, 1864, and the plaintiff was at the time of the execution of the contract, and is now, vested with the fee of the lands in question.

The first action decided by this court is reported in 122 N. Y. 505; the second, 136 N. Y. 593; the third, 163 N. Y. 173; the fourth and fifth, 167 N. Y. 608. It is unnecessary to recite this contract in full, as it will be found, except description of premises, in the report of this case when first tried at Special Term (13 Misc. Rep. 409); its material provisions are also discussed in 136 N. Y. 593, and 122 N. Y. 505.

The present action was begun in the Superior Court of the city of New York on February 2, 1893. It is based on a notice in writing dated February 1, 1893, signed by the plaintiff and her husband, and served on defendants, which is in substance an election to terminate the contract on the ground that, the defendants having ceased to mine coal on the premises, and a reasonable time having elapsed thereafter, the contract being executory, may be terminated by the parties injured.

The prayer for relief is, that it may be adjudged that the contract has been executed and ended and that defendants have no further rights thereunder, and that they be compelled to vacate the premises; that defendants account to plaintiff for damages she has sustained; that she be compensated for the benefit and advantage to defendants for mining of coal from their own land through the

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"Marvin Shaft" on a certain basis set forth; that defendants be enjoined from claiming any further rights under the contract.

The answer puts in issue the material allegations of the amended complaint, challenges the jurisdiction of this court, pleads the Statute of Limitations, adequate remedy at law, waiver and judgment in a former action in bar. There have been three trials of this action. On the first trial there was a decision for the defendants, the court holding, among other things, that the agreement was, in legal effect, a conveyance to the defendants of the coal in place, as land (13 Misc. Rep. 409). The Appellate Division reversed this judgment on the ground that the decision as to the agreement being a deed of land was in conflict with a decision of this court construing the contract, reported in 136 N. Y. 593 (*Genet v. D. & H. C. Co.*, 2 App. Div. 491). At the second trial there was a judgment for the plaintiff, which was reversed by the Appellate Division on the ground that plaintiff, by suing to enforce the contract and accepting the royalties under it, had waived the right to terminate (*Genet v. D. & H. C. Co.*, 28 App. Div. 328). The third trial resulted in a judgment dismissing the complaint on the merits, which was unanimously affirmed by the Appellate Division. The latter judgment is here for review.

The trial judge adopted the short form of decision, under section 1022 of the Code of Civil Procedure, and has stated concisely the grounds upon which the issues have been decided, and directed judgment thereon dismissing the complaint on the merits.

The principal question is whether there was legal error in admitting in evidence, over the objection and exception of the plaintiff, the record of a judgment between the same parties, entered upon the decision of the Second

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Division of the Court of Appeals, reported in 122 N. Y. 505. The plaintiff's counsel stated at the trial that he did not object, so far as the judgment appealed from by the plaintiff was affirmed, but did object to it so far as the judgment in favor of the plaintiff was reversed, on the ground that it is not *res adjudicata*. This objection was overruled and plaintiff duly excepted.

The complaint in the action which resulted in the judgment was between the same parties as in the present action, and based upon the same contract; but the judgment, on the *remittitur* from this court, adjudging that those parts of the judgment appealed from by the defendants be reversed and complaint dismissed, does not declare in terms that the dismissal was on the merits.

David B. Hill, for appellant.

Frank E. Smith and *David Willcox*, for respondents.

PARKER, Ch. J.—The court erred in admitting in evidence the judgment roll in the former action between these parties entered on a dismissal of the complaint ordered by this court on appeal and reported in 122 N. Y. 505, inasmuch as it is not expressly declared in the judgment that it was rendered upon the merits and it does not so appear in the judgment roll. It is not sufficient for a party, who sets up a prior judgment as a bar or seeks to introduce it as conclusive evidence, to produce a record showing a judicial determination in his favor of the question in litigation. He must further show, and by the judgment roll, that the judgment was rendered upon the merits and cause it to appear that the question was a material one in the former action. *Webb v. Buckelew*, 82 N. Y. 555;

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Revere Copper Co. v. Dimock, 90 N. Y. 33; Springer v. Bien, 128 N. Y. 99, 102; Shaw v. Broadbent, 129 N. Y. 114; Rose v. Hawley, 141 N. Y. 375; Converse v. Sickles, 146 N. Y. 200, 208; Genet v. D. & H. C. Co., 163 N. Y. 173. In the latter case this court said: "And although a decree in express terms professes to confirm a particular fact, yet if the stated fact were immaterial to the issue and the controversy did not turn upon it the decree will not conclude the parties in reference to such fact." The court in that case had under consideration the judgment roll now in question, and as to it said: "It is a sufficient answer to the appellant's claim to say that neither the judgment of this court nor the order and judgment entered thereon in the court below dismissed the complaint on the merits." And then, after quoting section 1209 of the Code of Civil Procedure and referring to the codifiers' note relating thereto, continued: "As this judgment would not have been conclusive between the parties in a new suit brought for the same cause of action, *a fortiori*, it cannot be conclusive in litigation as to other causes of action." That decision, therefore, seems to be a binding adjudication upon this court as to that question, cutting off the right of counsel to have it again considered by the court (Towle v. Forney, 14 N. Y. 423).

But if it were an open question the statute would require us to reach the conclusion then expressed, for it provides, in effect, that the dismissal of the complaint, either before or after a trial, shall not have the effect of preventing a new action for the same cause of action, "unless it (the judgment) expressly declares or it appears by the judgment roll that it is rendered upon the merits." Now, the judgment entered upon the dismissal of the complaint in that action, pursuant to the decision of this court, does not expressly declare that such judgment was

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rendered upon the merits, and unless it otherwise appears in the judgment roll it follows that the court is prohibited by the statute from holding that it was rendered upon the merits. The judgment was, of course, rendered by the Special Term in pursuance of the *remittitur* sent down by this court, and it did not declare that the decision was upon the merits; but if it appeared in the *remittitur* that the decision was rendered upon the merits, the requirements of the Code would be satisfied, for then the fact would necessarily appear by the judgment roll, of which the *remittitur* forms a part.

It quite often happens at the Special Term, through the omission of counsel to request the court to incorporate into the order that the complaint was dismissed upon the merits, or the neglect of the court to direct, of its own motion, the insertion of such a provision in the order, that a plaintiff is not cut off from bringing a new action, although the basis of the court's determination was that the action could not be maintained and it intended to make a final disposition of it. The defendant afterwards finds himself in such a case unable to invoke the judgment entered on the dismissal as a bar to an action and prevented from proving it as conclusive evidence against the plaintiff.

The courts might perhaps conclude to take other proof of the fact were it not that the Legislature in its wisdom has seen fit to provide a clear cut method by which the fact of the dismissal upon the merits may be established in a very simple way, namely, by expressly stating it in the judgment or causing the fact to appear in the judgment roll; as, for instance, in the order dismissing the complaint upon which the judgment of dismissal is finally entered. That section applies to dismissals either before or after trial, and hence is applicable to decisions made by

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the appellate courts as well as the trial court. No reason for a different rule in the appellate courts has suggested itself, but if there were one the courts could not make practical use of it for the reason that the statute imperatively prohibits the courts from treating a judgment entered upon the dismissal of the complaint as preventing a new action as to the same subject-matter unless the final judgment was rendered upon the merits, and strictly limits the courts in the search for evidence, as to the fact of declarations to that effect, to the judgment or the judgment roll, the purpose undoubtedly being to have the disposition of the question rested upon absolute certainty and not upon speculation which might occasionally result from an exploration of the judgment roll, drawing the inference from certain facts found therein that the trial court or the appellate court, as the case may be, intended that the first action should be dismissed on the merits.

The suggestion is made that section 1209 could be so construed as to require it to be expressly stated in the judgment that it was rendered upon the merits, but if the judgment (in which we look for the whole determination) is silent on the subject, then we may draw the inference, for instance, from statements in the order upon which the judgment is to rest, that the determination was upon the merits. In other words, it is suggested that the section requires an express declaration to appear in the judgment, which is the final repository of the rights of the parties as to matters involved in the action, in order to prevent a new action, but a statement of lesser value will suffice when it is found to be in the original order of dismissal, or other amendatory order, if there should happen to be one. It cannot readily be conceived that such a result could have been intended by the Legislature, and, if it were, apt language for its accomplishment was not chosen.

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but directly the contrary, as it seems to us, for it has named the judgment as the more natural and appropriate place to assert finality between the parties as to matters in controversy, and required that it should be expressly declared therein that it was rendered upon the merits; but if such an express declaration be omitted from the judgment, then that it will suffice if it appear elsewhere in the judgment roll. If the construction we have given the section be not the only one of which it is capable, it is certainly a more reasonable one and one that is in full harmony with the spirit of the section, and at the same time seems to be in accord with the letter.

The appellant further contends that the fourth finding, in which the court found, in effect, that the plaintiff, with full knowledge of the conduct of the defendants, had waived the right to terminate the contract by accepting royalties accruing thereunder and by bringing actions against the defendants in affirmance thereof, was error, in that the actions brought by the plaintiff were not in affirmance of the contract, while the royalties were accepted with the distinct understanding that it was without waiver or prejudice of any of the rights of plaintiff as appeared by the testimony of the plaintiff, which is further supported by the receipts for mining rents, each one of which, after acknowledging the receipt of the money, stated that it was "without waiver or prejudice," in which form it was accepted by the defendants. The view has been taken so far that these words in the receipts have no special legal significance, which, under the surrounding circumstances disclosed by this record, may well be questioned. Those words in the legal profession and among business men have a distinct and certain meaning like other business phrases, such as C. O. D. and F. O. B. In such cases the meaning of the letters is perfectly well understood,

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and in business full force and effect will be given to them because they are thoroughly comprehended by all business men. So, too, the words "without waiver or prejudice" have in the legal profession and among business men a well understood value. They import into any writing in which they appear that the parties have agreed that as between themselves the receipt of the money by one and its payment by the other shall not, because of the facts of the receipt and payment, have any legal effect upon the rights of the parties in the premises; that such rights will be as open to settlement by negotiation or legal controversy as if the money had not been turned over by the one to the other. The contention that the phrase is meaningless, because it does not point out in terms the subject to which it relates, is without force if the phrase has by common consent come to mean what I have asserted, namely, that each and every one of the rights of the parties in the subject-matter out of which the payment grows is not to be affected in anywise by the payment of the money and its receipt. During all the time that these receipts were given there was existing litigation between the parties growing out of questions connected with the mining of coal upon the plaintiff's lands, the right to do which the defendants claim they have secured by contract, litigation which the plaintiff was pressing against the defendants, and it would seem as if it could not have been otherwise than perfectly understood between the parties, even in the absence of other testimony, that the plaintiff and defendants both appreciated that the object of inserting these words in the receipt was to protect, not a particular interest, for then it would have been specified, but all interests which plaintiff had under her contract with the defendants; to preserve the right to enforce them in any manner whatever, which, in the absence of an under-

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standing to the contrary assented to by both parties, might be treated in law as having been waived by the conduct of the plaintiff in accepting the royalties to which she was entitled. It would seem as if the learned Appellate Division, on a former appeal in this case, might have erred in holding, as it in fact did, that this phrase in the receipts had, under the circumstances attending its making and delivery to defendants, no legal effect whatever.

The question, however, is not up for decision as I read the findings, which have been unanimously affirmed by the Appellate Division, for the trial court has not incorporated the receipts into the findings of fact nor disclosed whether it based its conclusion that the plaintiff traced the contract as in force by accepting the royalties accruing thereunder, solely upon the receipt or upon other testimony taken in connection with the receipt, and hence we are bound to assume, in view of the unanimous affirmation by the Appellate Division, that there was evidence to support so much of the finding as in reality finds facts. This will probably be so far remedied on a new trial as to present to the court the clean-cut question of law: Whether, under the facts surrounding the receipt of the royalties by the plaintiff, she did waive such legal rights, if any, as she had in the premises.

The other questions brought to our attention by the Appellate Division are not open on this record for discussion in this court, but the judgment should be reversed because of the error in receiving in evidence the judgment roll in the former action and a new trial granted: costs to abide the event.

GRAY, MARTIN and CULLEN, JJ., concur with PARKER, Ch. J.; VANN and WERNER, JJ., concur with BARTLETT, J., who reads dissenting opinion.

Judgment reversed, etc.

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Note on Section 1209, Code of Civil Procedure—Judgment Roll—Upon the Merits.—A dismissal of a complaint and a judgment well founded thereon from which it does not appear that it is on the merits is equivalent only to a non-suit, and does not bar the bringing of another action for the same cause. *McGulloch v. Vibbard*, 14 Civ. Pro. 388; *Lomer v. Meeker*, 35 N. Y. 361; *Briggs v. Waldron*, 83 N. Y. 582; *Wheeler v. Ruckman*, 51 N. Y. 391; *Nicoll v. Kar-rick*, 29 Civ. Pro. 367; *Genet v. Del. & H. C. Co.*, 163 N. Y. 173; *Ross v. Caywood*, 162 N. Y. 263.

Where there is a Trial upon the Merits.—At Circuit there is no trial upon the merits unless the questions are submitted to the jury for their findings of fact or a verdict is directed by the court for either party. *Mannion v. B'way, etc.*, R. R. Co., 18 Civ. Pro. 40.

Remedy—Where "Merits" is Erroneously Inserted.—When there is a non-suit at the close of plaintiff's case, for failure of proof, a recital in the judgment that the dismissal is upon the merits is erroneous and should, upon motion, be stricken out. *Mannion v. B'way, etc.*, R. R. Co., 18 Civ. Pro. 40; *Freeman v. United States E. L. Co.*, 20 Civ. Pro. 177.

What a Judgment may Provide.—But where a demurrer to a complaint is sustained on the ground that sufficient facts are not stated, the interlocutory judgment may properly provide for a dismissal of the complaint on the merits, in case the plaintiff fail to pay costs and serve an amended complaint within the time therein named. *Hommert v. Gleason*, 20 Civ. Pro. 349.

Answer.—If an answer contains a plea of former adjudication it is fatally defective unless it alleges that the former judgment or decree was upon the merits. *Patchen v. D. & H. C. Co.*, 62 App. Div. 544, 9 Ency. Pl. & Pr. 619-621, 2 Van Fleet Form Adj. 1327.

Effect of Non-payment of Costs of the Prior Action.—The failure to pay costs does not deprive the court of jurisdiction but leaves the court to determine in each case the propriety of its exercise. *Patchen v. D. & H. C. Co.*, 62 App. Div. 544; *Wessels v. Boettcher*, 142 N. Y. 212; *Barton v. Speis*, 73 N. Y. 133.

In the Matter of Eliza Stapleton.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT OF ELIZA STAPLE-
TON, DECEASED.SUPREME COURT—APPELLATE DIVISION—FIRST DE-
PARTMENT—MARCH, 1902.

§§ 1294, 2568, 2586, 2587, 2588.

*Right of executor to appeal. Question of testamentary capacity in
executing codicil to be submitted to jury.*

A person named as executor has a right to appeal from a decree refusing probate to a codicil and admitting to probate the will. The fact that the husband of a testatrix was constantly present with her during her last illness raises no presumption of duress or undue influence, although she changes her will so as to give him an interest in her estate.

Upon appeal from an order denying probate to an instrument purporting to be a codicil to a will, Held, that a jury trial should be awarded to determine the question of testamentary capacity. (*Decided March, 1902.*)

Separate appeals by Patrick Stapleton and A. J. Leary, as executor, from portion of decree refusing probate to codicil.

Roger Foster and George F. O'Shaunessy, for appellants.

John A. Foley, special guardian, for respondents John C. and William Egan.

Joseph H. Fargis, for respondents Annie Egan and Hugh Egan.

O'BRIEN, J.—We think that the executor has in this case the right to appeal. The Code of Civil Procedure

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provides (secs. 1294 and 2568) that a "a party aggrieved may appeal." These words as applying to executors have been construed in several instances by the court; but we have been referred to no case wherein the refusal of the surrogate to admit a will or codicil to probate was involved. In the authorities cited in the dissenting opinion, the question related to the construction to be given to a portion of a will which arose after probate and in the course of administration, when the obligation resting upon the executor was purely ministerial and he had no interest in the actual distribution made, and, therefore, was not "aggrieved" by the decision rendered. A distinction, however, is to be observed between directing an executor as to the precise manner in which he shall act and denying to him the right to act at all. In the latter case he becomes a "party aggrieved," because he is charged with the duty of probating the instrument by virtue of which he receives his office, and thus he is entitled to appeal from a decree which ousts him from the exercise of such functions, and which denies to the beneficiaries whom he represents the right to receive the property as set forth in the will or codicil.

This principle was fully recognized in the authority relied upon of *Bryant v. Thompson* (128 N. Y. 435), wherein the court defined a party aggrieved as one "having an actual and practical as distinguished from a mere theoretical interest in the controversy," and said: "The case of *People ex rel. Burnham v. Jones et al.* (110 N. Y. 509), is not contrary to these views. In that case the commissioners of the land office, representing the State, made a grant of land under water to an individual. Subsequently the determination of the commissioners * * * was reversed by the Supreme Court on *certiorari* and the commissioners appealed to this court, where a motion to

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dismiss was denied. The order appealed from in that case in effect nullified the grant made by the State, and the commissioners, as public officers representing the State, were in duty bound to defend the grant against the effect of an erroneous decision and so were aggrieved." And in *Bliss v. Fogg* (27 N. Y. Supp. 1053), it was held (headnote) that, "where judgment is rendered for defendants in an action by executors to compel a transfer to them of certain property, the executors are parties 'aggrieved' within Code of Civil Procedure, section 1294."

In considering similar language in *Green v. Blackwell* (32 N. J. Eq. 768, 772), where the statute there gave an appeal to "any person aggrieved," the court said: "Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made, is, within the meaning of these laws, aggrieved and, therefore, may appeal." A codicil is a part of the will. It is executed with the same formalities, and the testamentary disposition sought by it to be made is treated and is the same as though the provisions were actually incorporated in the body of the will itself. The codicil, in fact, is a will, and is to be carried out by the executors named in the will, and, therefore, the same rules apply as would apply to rights of parties acquired under a will.

Upon the merits, we think this is peculiarly a case which should be submitted to a jury for determination. The evidence, as we view it, preponderates in favor of the conclusion that the codicil was duly and properly executed, and that the testatrix was of testamentary capacity. What is to be kept in mind in every case where the probate of a testamentary paper is involved, is whether the legal requirements are complied with and whether the testator was of sound mind and disposing memory and unaffected by undue influence or constraint. As will be

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seen from the opinion of the learned surrogate, he was "not satisfied" that the codicil was validly executed, or that the testatrix intelligently assented to its execution, or that she was free from the restraint or compulsion of her husband. It is not attempted to show that the codicil was not executed with the statutory formalities, but it is claimed that the evidence discloses inability of the testatrix to intelligently and freely assent to the codicil owing to her ill health and the undue influence of her husband.

The testimony of the subscribing witnesses to the codicil—the lawyer who prepared it and the family physician of the testatrix—shows that every essential element was present in the manner of its execution. They testified that she stated she wished the codicil to be made giving to her husband the money in the bank, and it was so made and read to her and she approved it; that, though she attempted to rise up in bed and sign her name, the doctor thought it inadvisable, and so she was supported in bed and the attorney held her hand on the pen, and thus the mark was made, to which he added the words "Elizabeth Stapleton, her mark;" that she declared it to be a codicil to her last will and testament and asked them both to sign as witnesses, which they did in her presence and in the presence of each other. The physician further testified that the testatrix had formerly indicated her desire to change her will in this manner and he had attempted to prepare a paper for her, but learned that it was illegal, and told her she should get an attorney, which was then done. His testimony is not discredited because this discarded paper was not put in evidence.

Such testimony, showing a desire to make the codicil in question and a compliance with the legal requisites, which is absolutely unchallenged, goes far to showing that the testatrix acted freely and intelligently. And it is

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supported by the further testimony of the lawyer and the physician that she was at the time, in the words of the latter, "of sound and disposing mind and memory and understanding," and not "under any restraint or influence or duress." On this subject of duress there is not a word of testimony to show that the husband exerted any undue influence. The uncontroverted testimony, even of the contestants' own witnesses, is that there had never been family disputes; and the fact that the husband was attentive and well disposed towards his wife, and was with her constantly during her illness, is what was to be expected of him, and is no basis for finding that he exerted undue influence.

The real question thus comes to be whether or not the testatrix was physically able to intelligently supplement her will by this codicil. It is true that she was, as stated by the learned judge writing the prevailing opinion, "on her deathbed," but so she was when she executed the will itself. Was she on the 18th day of March, the date of the codicil, able to make a valid testamentary disposition? Those who were present say that she was; and these include, besides the lawyer and physician, the housekeeper, who said "she was all right in her mind and knew what she was doing and saying;" adding that after the execution the testatrix requested her to remove papers scattered upon the bed and to give her a drink of water, and thereafter said she wanted to lie down, as she had been propped up in bed. The housekeeper further said, that the day before Mrs. Stapleton had given directions as to what preparations to make for dinner.

Another witness said she had seen the testatrix the day prior to the making of the codicil and she had mentioned that she intended to give the money to her husband; and a boarder in the house testified that the day previous,

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March 17th, he had talked with her and she was rational, and he often had seen and spoken with her about that time. Another witness said she called on the testatrix on March 23d, and shook hands with her and asked her how she felt, and she said she was feeling pretty good but she was very weak; that Mrs. Stapleton then asked about her family and she thought her of sound mind. Father Farrelly, who, from March 1st, had constantly attended the testatrix, testified that at times she was flighty, but that about the middle of the month he came to the conclusion that she was going to get better, and that on the 18th of March he took her confession. As to this we have the following questions and answers: "Q. You had every opportunity on that particular day of seeing her condition, of observing her condition? A. Yes. Q. You can state positively that she spoke intelligently on that day? A. Oh, yes. Q. Heard her confess intelligently? A. Yes." Another priest testified that at times during March his conclusion was her mind was wandering, but she also during that month spoke to him intelligently. A niece of the testatrix testified that either on the 19th or else on the 26th she called on her aunt but had not seen her previously for a year, and her aunt did not know her. And another niece testified that she saw her aunt on March 12th, and the latter asked her irrational questions. The contestants also called one of the residuary legatees, who testified that he was in the habit of visiting his aunt during her last illness; but he was not asked how she was at such times.

It will be seen that the testimony of all the contestants' witnesses, regarding the irrational condition of the testator at the times mentioned by them, is not inconsistent with the testimony of the proponent's witnesses that on the 18th of March, when the codicil was duly executed,

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she was of sound mind and disposing memory. On the other hand, to refuse probate to the codicil is to impeach the statements of the subscribing witnesses, a physician and lawyer. The testimony of the two nieces, that when they called their aunt did not appear rational, is explained by the priests who called often during the month, and who testify that sometimes she was "flighty," although at other times perfectly intelligent. That she was of sound mind on the 18th and able to make a valid disposition of her property as testified by those present at the time is corroborated by the statement of Father Farrelly that about the middle of the month he thought she was going to get better, and that on the 19th, the day following the execution, he took her confession. And it is also corroborated by all the other disinterested witnesses who called about this time and conversed with the testatrix. Furthermore, according to the housekeeper, who was with Mrs. Stapleton constantly, she did not become actually unconscious until two days before her death, which occurred March 31, nearly two weeks after the execution of the codicil.

From this summary of the evidence we think it is clear that this case, as stated, is one requiring that the question of the testamentary capacity of the decedent should be determined by a jury. That part of the decree, therefore, from which this appeal is taken should be reversed and a trial ordered before a jury, with costs to the appellant to abide event.

VAN BRUNT, P. J., and PATTERSON, J., concur.

LAUGHLIN J. (dissenting).—The decree admitted the will to probate, but adjudged that the codicil was null and void upon the ground that at the time of its execution the testatrix "had not sufficient mental capacity to exe-

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cute the same," and "was not free from restraint or compulsion of her husband, Patrick Stapleton."

The appellant, Stapleton, was the husband of the testatrix, and he alone was benefited by the codicil. He was duly cited on the probate proceedings, but failed to appear, and as to him the decree was entered by default. The appellant, O'Leary, is one of the executors of the will, and it was probated on his application. Father Boyle, the testatrix's parish priest, was the other executor, and he appeared in the proceeding, but has not appealed. The will consisted of thirteen clauses or paragraphs apart from that in which the executors are appointed. The first eleven clauses directed the payment of her debts and funeral expenses and the sale of the house and lot where she resided, and of which she died seized, and gave legacies aggregating \$5,600, together with two specific bequests, one of her life insurance and the other of another lot and improvements within the city of New York. By the twelfth clause she gave, devised and bequeathed the rest, residue and remainder of her property to the children of her deceased sister, Mary Egan, share and share alike. By the thirteenth clause she declared that she made no mention of her husband in her will, "because he is already well provided for with this world's goods to need anything from me." The will was executed on the 26th day of February, 1899. The codicil was executed on the 18th day of March, 1899. It expressly revoked the twelfth and thirteenth clauses of the will, and further provided as follows:

"I give, devise and bequeath to my beloved husband, Patrick Stapleton, all the moneys deposited to my credit in the Harlem Savings Bank, One Hundred and Twenty-fourth street and Third avenue, New York city, all the moneys deposited in the Emigrant Industrial Savings

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Bank, No. 51 Chambers street, New York, and all the moneys deposited in the Bank for Savings to my credit, Twenty-fourth street and Third avenue, New York city. And I do hereby further give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my said husband for himself, his heirs and assigns forever, with the exception of my piano, which I give to Maria Clair."

At the outset, the respondents challenge the right of the appellants or either of them to appeal from this decree, and this is the first question to be considered. The appellant, O'Leary, takes nothing under the will or codicil, except his appointment as executor, which has been confirmed by the decree. It is, therefore, contended, and seems clear to us, that he is not aggrieved by that part of the decree which declines probate to the codicil within the fair intent and meaning of the provision of the Code authorizing such an appeal by an aggrieved party. Code Civ. Pro., secs. 1294, 2568; *Matter of Hodgman*, 11 App. Div. 344, *aff'd* 161 N. Y. 627; *Matter of Coe*, 55 App. Div. 270; *Bryant v. Thompson*, 128 N. Y. 426; *Matter of Hodgman*, 140 N. Y. 421.

The appellant, Stapleton, being the sole party benefited by the codicil is manifestly the "party aggrieved" by that portion of the decree from which the appeal is taken. The record, however, fails to show that he appeared in the probate proceeding, and as to him the decree seems to have been "rendered or made upon his default." The court is, therefore, without jurisdiction to hear the appeal. Code Civ. Pro., secs. 1294 and 2568; *Matter of Peekamose Fishing Club*, 151 N. Y. 511; *Innes v. Purcell*, 58 N. Y. 388; *Flake v. Van Wagenen*, 54 N. Y. 25; *McMahon v. Rauhr*, 47 N. Y. 67, 72.

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It follows that both appeals should be dismissed, with separate bills of costs, one to the respondents, Annie Egan and Hugh Egan, and one to the special guardian of the infant respondents, payable by the appellants personally.

If, however, we are to consider the merits of the appeals, I think we should arrive at the same conclusion, except that the decree should be affirmed, with such separate bills of costs to the respondent, instead of being dismissed.

The beneficiaries under the twelfth clause of the will answered the petition for the probate of the will and codicil and objected to the probate of the codicil. No objection was made to the probate of the will. Its provisions and the circumstances attending its execution are material, therefore, only so far as they have a bearing on the contest over the codicil.

An examination of the merits requires a review of the facts. On such an appeal this court has the same power to decide questions of fact which the surrogate had, and it may receive further testimony or documentary evidence or appoint a referee, and may, if necessary or proper, direct a jury trial of the material questions of fact. Code Civil Procedure, secs. 2586, 2587, 2588. We have not been requested, however, to receive further testimony or evidence, nor has it been suggested that the facts could be changed upon a new trial. the proper consideration of the appeal, therefore, requires an expression of the individual judgment of each member of the court upon the question as to whether the evidence shows that the testatrix was competent to make the codicil and that it was her free voluntary act, or whether it shows that she was either incompetent or was unduly influenced by her husband. A careful examination and consideration of the

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evidence convinces me that the learned surrogate has properly decided the facts.

The amount or value of the estate does not appear, but the value of the house and lot where the testatrix resided, according to the witness Sullivan, who drew the codicil, was \$17,500. The testatrix died on the 31st day of March, 1899, or thirteen days after the execution of the codicil. On the 12th day of February preceding her death, according to the evidence of the appellant, O'Leary, who was her family physician, the testatrix became ill, and was from that time on confined to her bed. She was upwards of 46 years of age, weighed from 175 to 195 pounds, of ordinary intelligence, able to write, of a talkative disposition, and for something like thirteen years or more she had been engaged in the dry goods business on her own account. Her ailment was cirrhosis of the liver. At first she could take little solid food, but was confined to a liquid diet early in her illness. Her heart action was affected at times, causing a shortness of breath. She ceased to be talkative and became dozy, gradually growing worse, and was unconscious for about two days before her death. About three weeks before her death she ceased to order supplies for her house or to retain charge of her moneys. Her husband was or had been a policeman. Her living apartments were on the second floor over her store in the building No. 476 Brook avenue, which was owned by her. Her household consisted of her husband, her cousin Julia Minton, who was her housekeeper, a boy named Joseph Clarence, known as William Stapleton, and John Clare, a boarder. During her illness she had a nurse, Mrs. Peets. Of these Julia Minton and John Clare only were called as witnesses. Henry W. Bates, Esq., acted as legal adviser for the testatrix. She had employed him to draw her will and informed him how

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she desired to leave her property, and the will was ready about a month before it was executed. The delay in its execution was owing to her absence from the city. After her return, and on February 9th, she called at her attorney's office and obtained her bank books which she had left with him. On this occasion, according to the testimony of Miss Girvin, a stenographer employed by Mr. Bates, she walked to the car with the testatrix at the latter's request, and the testatrix inquired of her concerning the will, and particularly about the provision concerning her husband, stating that her husband received a pension from the police department, but squandered it in a policy shop.

At the time of the execution of the will, on the 26th of February, the husband was present and heard Mr. Bates carefully read and explain the will to the testatrix. On hearing the provisions of the will the husband asked: "Where do I come in?" to which the testatrix replied: "You are taken care of all right." Mr. Bates, Miss Girvin and the husband were the subscribing witnesses to the will.

The alleged codicil was executed twenty days after the execution of the will. Although the testatrix knew how to write and had signed her name to the will, it is conceded that she did not write her name to the codicil, but it is claimed that she executed it by making her mark. At the time of the execution of the codicil it appears that she made an attempt to sit up and sign her name, but was so weak that she was unable to do either. She was then upon her deathbed. Her limbs for some time had been swollen by her disease, and she had virtually ceased to talk except in answer to questions. It was shown that at times, both prior and subsequent thereto, she was irrational. The testimony of her niece, a disinterested

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witness, showed that on the 12th of March the testatrix inquired about the health of a number of her relatives who had been dead for years, and that the appellant, Stapleton, told the witness on this occasion that the testatrix had been that way all along; that the testatrix was dozing and did not seem to understand what was said to her, and said to a cousin of the witness in her presence that the witness had been there that morning and taken her to church. Another disinterested niece of the testatrix testified that she visited her on the 19th or 26th of March and found her dozing and wandering in her mind during the two hours the witness remained; that at first the testatrix mistook her for a cousin of the witness, but that just as the witness was leaving she called her by name and gave her some pictures to take home, which was apparently the only rational conversation she held during that time.

The testimony of Father Boyle, and Father Farrelly, his assistant, is entirely consistent with her incompetency at the time of the execution of the codicil. Their testimony indicates that at times she was rational and that at times her memory was gone and she was irrational. On the 19th of March Father Farrelly administered to her the rites of the church, and in his opinion she was then of sufficient mind to understand these religious ministrations; but the fact that a woman critically ill is able to comprehend that she is facing death falls far short of establishing that she was of sufficient mind, memory and disposition to think of her terrestrial affairs sufficiently to make a valid disposition of her property.

The direct evidence as to what transpired at the time the codicil was executed is very conflicting, and the witnesses have so contradicted themselves as to seriously discredit their testimony. I recognize the rule that relatives

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have a right, without being charged with duress or undue influence, to call attention to their claims upon the bounty of a person about to make a will; but in the case at bar I am impressed with the belief, from reading and weighing the testimony, that the husband unduly influenced his dying wife to make this codicil contrary to her wish and intent at a time when she was not of sound and disposing mind and memory. It is significant that he defaulted on the probate proceedings and did not take the stand as a witness. It was competent for him to deny that he manifested displeasure at the will as originally made and executed. Concededly the testatrix was then competent and far stronger, both mentally and physically, than at the time of the execution of the codicil, yet his complaint that he was receiving nothing under the will had no effect on her mind at that time. It was competent for him to deny his admission to the niece on the 12th of March that the testatrix had been in that flighty, irrational condition all along during her illness. It was also competent for him to show that he was not properly provided for, was not receiving a pension, and had not squandered it by playing policy, as stated by the testatrix. Yet he has not denied any of these things.

The appellant, O'Leary, first testified that at the beginning of her illness the testatrix asked him to draw a paper giving her money in the banks to her husband, but he subsequently altered his testimony and fixed the time after the execution of the will. He says she told him she had made a will and left her husband out and she wanted to right the wrong, and that he drew a paper to that effect, which she signed. The paper was not produced. He also says that he ascertained from his brother on the day of the execution of the codicil that this paper would not be effectual for the purpose intended, and advised the

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testatrix to that effect, whereupon she summoned her husband, who suggested that they get a lawyer, and that at the request of the testatrix the husband went out, and within fifteen or twenty minutes came back with Lawyer Sullivan; that he was present during the attorney's talk with her, and did not hear her give the latter the names of the banks, but he subsequently changed his testimony and said the lawyer talked with her privately; that the husband was in and out and was present when the codicil was finally read to the testatrix and executed. He also says that Mrs. Minton, the housekeeper, was present and propped the testatrix up with a pillow at the time the lawyer had her make her mark, but this Mrs. Minton denies.

The attorney who drew the codicil first testified that pursuant to a message left at his house he called on the testatrix between 11 and 12 o'clock on the evening of the 17th of March; that he had done some criminal business for her relatives at her request, but he knew that Mr. Bates was her attorney; that the testatrix told him that her husband had earned the money and she had taken care of it for him and she wanted to change her will; that he read the will and handed it back to her, because he wished the doctor to be present at the time of the execution of the codicil and made an appointment for the next day; that he came pursuant to that appointment, and not, as claimed by Dr. Sullivan, on the summons of the husband; that he drew the codicil in the kitchen; that the testatrix told him she desired her husband to have the property disposed of by the twelfth and thirteenth clauses of the will, and that after he drew the codicil he read it to her. At first he testified that he conferred with nobody before going to the testatrix's room, but later he said that he saw the appellant, Stapleton, in the kitchen and told

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him to keep out of the room where testatrix was; that after his interview with the testatrix, when he went to the kitchen to draw the codicil, Stapleton was there and brought the ink. After he had been repeatedly asked to state all the conversation between him and the testatrix, and had failed to show where he got the names of the banks which he inserted in the codicil, he finally testified that he got them from the testatrix and located them from memory. When asked to repeat the whole conversation again he then first revealed the fact that this was his third visit to the testatrix, and that he had called to see her about a week or ten days before pursuant to word left at his house, by whom he did not know; and says that on that occasion she told him she wanted her will changed so as to give the balance to her husband, but that she could not get the will herself, and he departed on the understanding that he would call when sent for.

It appears from the testimony of this attorney that he volunteered the information to the testatrix that there would be a surplus out of the premises where she lived after paying the legacies which she had provided for in the will and that she thereupon informed him that she wanted her husband to have that also. When asked if she was strong enough to sign her name he says that he did not know she could write, although, according to his evidence, he had the will before him signed by her.

I regard it as quite significant that the husband persisted in being in the room when the codicil was read and executed after he had been advised by the attorney to remain out. There is no rational explanation for a change of intention on the part of the testatrix between the time of the execution of her will and codicil. There appeared to have been no change in her relations with her nieces for whom she provided in the twelfth clause of the will.

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Nor does it appear that there was any change in her relations with her husband or in his financial affairs. It was not shown, or attempted to be shown, that the husband earned the money which was deposited in these banks as stated by her, according to the testimony of some of the witnesses. Nor was it shown that she authorized the summoning of attorney Sullivan on either the first or second occasion.

The evidence in this case covers more than 100 pages of the printed record and I have not attempted to digest it all. I have called attention in a general way to that which I deem probable, and which to my mind satisfactorily indicates and justifies the inference that the codicil was not the free act of a competent testatrix. I therefore see no occasion for ordering a jury trial, and if the merits are to be considered I favor affirmance with separate bills of costs to the respondents as indicated.

LOUIS SACHS ET AL., PLAINTIFFS, v. AMERICAN SURETY COMPANY OF NEW YORK, DEFENDANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—MARCH, 1902.

§ 1915.

Construction of bond. Measure of damage for breach.

A bond construed and held that it was given as security for the faithful performance of a contract by the obligor to erect a building upon property conveyed to him by the plaintiffs.

A parcel of real estate was conveyed by the plaintiffs to the obligor at a purchase price of \$190,000, to be paid by assuming an

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existing mortgage of \$120,000 and giving a purchase-money mortgage for \$70,000, its actual value being but \$160,000, and the plaintiffs being, therefore, entitled to receive a profit of \$30,000. The obligor contracted to erect upon the premises a building and the plaintiffs agreed to advance \$100,000 as a building loan, to be secured by a further mortgage. The obligor wholly failed to erect the building, the purchase-money mortgage was foreclosed, and resulted in a deficiency of upwards of \$50,000. In an action on the bond the plaintiffs offered to prove that if the building had been erected the property would have been worth \$400,000 at the time of the completion and at least that sum ever since. *Held* that such evidence was competent and was erroneously excluded.

Held, further, that had the evidence been received it would have shown beyond peradventure that the plaintiffs would not only have secured their profit of \$30,000, but would have suffered no additional loss upon their purchase-money mortgage; that they would thus have reaped the full profit contemplated in the transaction; that the loss occasioned by the breach of contract to complete constituted the measure of damage; and that the surety upon the bond was liable for its full amount, which was less than the amount of such loss.

The surety having caused the evidence of value if the building had been erected to be erroneously excluded, is justly chargeable with the consequences and is precluded from insisting that the judgment against it is unsupported by evidence.

Where the condition of a bond is for the performance of an act and not the payment of money, a recovery is limited to the amount of the penalty, and interest runs only from the judgment.

(*Decided May, 1902.*)

Motion for a new trial on exceptions directed to be heard at the Appellate Division in the first instance.

George W. Wickersham, for plaintiffs.

Charles DeHart Brower, for defendant.

HATCH, J.—This action was brought to recover the sum of \$25,000 and interest, the amount of a bond duly executed by the defendant and one Lewis Hay, against

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whom the complaint was dismissed, it appearing that he had become a bankrupt since the commencement of this action.

There are practically no disputed questions of fact, defendant calling no witnesses. The bond in suit arose out of a contract of sale entered into between the parties on July 1, 1897, by the terms of which plaintiffs agreed to sell and Hay to buy certain premises situated on Broadway, in the city of New York. The purchase price was \$190,000, to be paid by Hay assuming a first mortgage for \$120,000, and giving a purchase money mortgage for the \$70,000 balance. It was further agreed by the terms of this contract that Hay should erect upon the premises a fireproof building in accordance with certain plans and specifications to be made, and which should meet the approval of the plaintiffs, and be based upon certain sketches then in existence. The plaintiffs, upon their part, agreed to advance the sum of \$100,000 to Hay as a building loan, payable in installments as the work progressed. In the event of the contract being assigned it was provided that, in addition to having the bonds and mortgages of the owner of the said premises for \$70,000 and \$100,000, respectively, plaintiffs were to have the personal bonds and obligations of Hay for said sums. Hay further agreed "at or before the delivery of the deed of said premises to furnish at his own expense a bond of the American Surety Company, such company to be approved by the parties of the first part (the plaintiffs), guaranteeing to the parties of the first part the faithful performance by the party of the second part (Hay) of all the terms of this contract, and agreeing to hold the party of the first part harmless from any damages resulting to them from any breach thereof to the extent of \$25,000." Title to the premises was to be closed on July 9, 1897, and upon

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that day the contract in question was assigned by Hay to one Jackson, and as part of the same transaction plaintiffs' deed to Jackson, Jackson's and Hay's bonds, and the purchase money mortgage were delivered and executed. Before this transaction, however, the bond in suit was delivered. This bond was for the penal sum of \$25,000, and was upon the condition that "if the said J. Lewis Hay shall, within the time in said agreement required, to wit, on or before February 1, 1898, erect and complete such building upon the premises in the manner and as required, * * * then this obligation shall be void; otherwise it shall be and remain in full force and effect." This condition of the bond was wholly unfulfilled, no building being erected upon the premises. The interest on the \$120,000 not being paid, a foreclosure action was commenced, and to protect themselves the plaintiffs paid the interest, procured a person who took an assignment thereof and had the foreclosure suit discontinued. The interest on the \$70,000 mortgage being due and unpaid, this mortgage was foreclosed and a deficiency judgment recovered against Hay for the sum of of \$51,469.44, upon which execution was issued and returned wholly unsatisfied.

The point in controversy seems to be the construction of the contract of suretyship given by the defendant and the measure of damages to be applied, if it be found that there has been a breach of its conditions. A contract of suretyship is to be construed in accordance with the same rule that applies to the interpretation of any other written instrument. The limitation of liability is not upon the interpretation, but in application of the contract after interpretation, when the rule of *strictissima juris* applies. *Smith v. Molleson*, 148 N. Y. 241. If there be ambiguity in the contract, it is construed in favor of the

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person who has accepted it and expects to take benefit under it. *Gamble v. Cuneo*, 21 App. Div. 413, aff'd 162 N. Y. 634. In arriving at the correct construction of such a contract it is always permissible to take into consideration the circumstances and surroundings of the parties at the time when the contract was made, and such construction will be given to it as will carry out the evident intent of the parties to the instrument.

In the present case it seems clear that the parties to the contract of purchase and sale contemplated that the erection of a building of the character described in the contract, upon the lands so purchased and sold, would so far increase the value of the whole property that it would furnish an abundant security for the mortgages thereon and also for the sum to be advanced in the erection of the building. It is also evident that unless a building was construed on the premises the land itself was an inadequate security for the payment of the mortgages, and, as it was vacant property, no revenue would be derived therefrom sufficient to meet the fixed charges resting upon it on the consummation of the sale. It seems fairly inferable, therefore, that what the plaintiffs desired was security for the faithful performance of the contract in the erection of the building, as by such course only could plaintiffs' purchase money mortgage be adequately secured. This, therefore, it seems to us, was the main purpose in procuring the bond of the defendant.

We agree with the contention of the appellant that the bond was not given to secure the payment of the purchase price of the premises. There was no need of it for such purpose, as the purchase price was, by the terms of the contract of sale, paid by the assumption of the \$120,000 mortgage then resting upon it and the execution and delivery of the bond and mortgage of Hay for the remainder

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of the purchase price; and such agreement was further carried out by the obligation assumed by Jackson, Hay's assignee, under the contract; so that by the terms of the contract and the acts of the parties there was nothing to secure in this respect, as the whole was completely performed and ceased to be in any sense executory. Respecting that portion of the contract which provided for the erection of the building and the advance of the \$100,000 as a building loan, it was in its entirety solely executory. It is clear that the bond was not security for the advance of the building loan by the plaintiffs of the \$100,000. Neither Hay nor his assignee, Jackson, was bound to avail himself of the provisions of the contract in this regard. Either one or both could use their own money for that purpose, or procure a loan elsewhere, or adopt any other means to raise the money. The plaintiffs were only bound to furnish this money in the event that Hay or Jackson required it; consequently the instrument cannot be construed as relating to such subject or as requiring Hay to demand the money of the plaintiffs. It is evident, therefore, that the real subject-matter which the plaintiffs desired was security for the erection of the building. Such are the terms of the instrument sued upon, and such is the clear inference to be derived from the circumstances and surroundings, the terms of the contract, and the acts of the parties thereunder. The case presents, therefore, a concurrence of rules by which the contract is to be interpreted, and results in construing it as imposing upon Hay an obligation to erect the building in accordance with the terms of the contract. It is conceded that in this respect the contract was wholly unperformed, as no building was erected upon the premises. Therefore, there was a breach of the conditions of the bond, and the only remaining question relates to the measure of damages to be applied.

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The learned trial court took the view that the measure of damages became fixed upon the failure to construct the building, that the proximate result flowing therefrom was the impairment of the purchase-money mortgage taken by the plaintiffs, and, inasmuch as upon the foreclosure a deficiency judgment was rendered for \$51,000, such sum furnished the measure of the plaintiffs' loss by reason of the breach. Whether, under the circumstances, as developed upon the trial, the evidence, which was regarded by the court as sufficient to establish the damage, authorized this rule as a measure of damages, need not now be either asserted or denied, as other considerations show clearly that the plaintiffs are entitled to recover the whole amount of the penalty of the bond.

The purchase price of the property was \$190,000. Its actual value seems to have been but \$160,000, and the plaintiffs, by virtue of their contract, were entitled to receive a profit of \$30,000. Assuming that the contract has been carried out with fidelity, it appears that the whole amount of incumbrances thereon would have been \$290,000. This sum includes the mortgages, the purchase price, and the \$100,000 building loan. It is quite possible that to this sum there might have been added architect's fees and other expenses, which would make a grand total approximating \$300,000.

The plaintiffs offered to prove upon the trial that if the building had been erected upon the premises in accordance with the terms of the contract the property would have been worth \$400,000 at the time of completion, and at least that sum ever since. The defendant objected to this testimony, and, upon its objection, the court excluded it. Had it been received it would have been shown beyond peradventure that the plaintiffs would not only have

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secured their profit of \$30,000, but would have suffered no additional loss upon their purchase money mortgage. Thus they would have reaped the full benefit of the contract which they made and to which they were entitled, but for the breach of the contract for performance of which this bond stood sponsor. Under such circumstances, the loss occasioned would furnish the measure of damage within the principle laid down in *Kidd v. McCormick*, 83 N. Y. 391.

In making disposition of this case we are authorized to assume that it would have been established, had this evidence been received, that the contract, if fulfilled, would have produced a property worth at least \$400,000. This would furnish an equity over and above all incumbrances and expenses of \$100,000, which would have belonged either to Hay or Jackson, or both. The defendant, having by objection caused this evidence to be erroneously excluded, is justly chargeable with the consequences, and is precluded from insisting that the judgment be reversed because there is no evidence to support it. 2 Enc. Plead. & Practice, 528. The evidence was competent. *Germain v. Patterson*, 46 Barb. 12.

The defendant insists that it only stood a surety for Hay's performance of the contract, and that by reason of his assignment to Jackson and the consent thereto by the defendant became released. There are two answers to this contention. First, no such defense was pleaded; and, second, the obligation assumed by Hay was not personal, but could be performed by anyone else for him. The contract contemplated that it might be assigned, and was so in fact, but by such assignment Hay was not released from performance; on the contrary, he was held to the terms of the contract which he assumed. There are, therefore, no facts upon which a release could be predicted.

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The court awarded a recovery of interest upon the sums secured by the bond. In this we think it was in error. The condition of this bond was for the performance of an act, and not the payment of money. Under such circumstances a recovery is limited to the amount of the penalty, and interest only runs from the judgment (*Polhemus Printing Co. v. Hallenbeck*, 46 App. Div. 563). *Sloan v. Baird* (162 N. Y. 327) has no application. That was an executory contract for the sale of land. The bond in the present case is subject to the provisions of section 1915 of the Code of Civil Procedure, and furnishes the rule respecting the award of interest in contracts of this character.

It follows that the exceptions should be overruled and judgment directed in favor of the plaintiff for the amount of the penalty of the bond, without interest prior to the direction of the verdict. No costs in this court awarded to either party.

All concur.

Note on Section 1915, Code Civil Procedure—When Interest is Calculable.—Where the breach is conditioned upon an act, no interest can be calculated. But if the bond is conditioned for the payment of money only, interest may be calculated. (*Polhemus Printing Company v. Hallenbeck*, 46 App. Div. 567.)

Interest in the former case, however, runs only from the judgment. (*Sachs v. American Surety Company*, 76 N. Y. Supp. 339; S. C. 72 App. Div. 66.)

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EMMA J. RICHARDSON AND BENJAMIN NICOLL,
AS ADMINISTRATORS, &c., OF JOSEPH RICHARD-
SON, DECEASED, APPELLANTS, v. EMILY EM-
METT, RESPONDENT.

COURT OF APPEALS—APRIL, 1902.

§ 829.

Evidence. Construction of Section 829, Code of Civil Procedure.

Section 829 of the Code, which excludes evidence by a party of a personal transaction with a deceased person, extends, also, to the exclusion of evidence from which an inference would necessarily be drawn of such a transaction.

When, therefore, for the purpose of establishing a gift from a deceased person to the defendant of certain securities which he had caused to be made out in her name but afterwards used for his own purposes, the defendant was permitted to testify, under objection, that she, in the meantime, had had possession of them at his home, whereupon the referee found that delivery was established, such evidence is reversible error.

(Decided April, 1902.)

Appeal from a judgment of the Appellate Division, First Department, affirming a judgment entered upon the report of a referee.

DeLancey Nicoll, for appellants.

Howard Taylor, for respondent.

PARKER, Ch.J.—This controversy directly involves about the sum of \$10,000, being the surplus resulting from a sale by the Atlantic Trust Company of 200 shares of the capital stock of the New York, Lackawanna & Western Railroad Company, held by it as security for a loan made to Joseph

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Richardson, now deceased, whose personal representatives these plaintiffs are. The defendant, Emmett, claiming to be the owner of these shares, demanded such surplus of the Atlantic Trust Company, which company, being sued by the plaintiffs for the money, successfully moved the court to substitute the present defendant in its place as a person claiming the fund.

Upon the trial it appeared that in October, 1882, the New York, Lackawanna & Western Railroad Company issued certificates of its stock for 350 shares to Joseph Richardson, which he paid for and owned. Nearly three years later, and on August 21, 1885, Richardson executed a power of attorney, in the usual blank form, indorsed on the back of the original certificates issued to him, which in form sold and assigned to Emily Emmett, this defendant, the shares of stock represented by the respective certificates, and appointed John J. Owen an attorney in fact to transfer the stock to her on the company's books. Owen, acting under these powers, caused the old certificates to be canceled and four new certificates for 350 shares, dated August 21, 1885, to be made out in the name of Emily Emmett. On the day following, these certificates were handed to Brayton Ives & Co., who were Richardson's stockbrokers, and two or three days later they came into Richardson's custody.

Emily Emmett was a niece of Richardson, and on the death of her parents, when she was about 5 years old, she went to reside with Richardson and his wife and continued to be a member of his household ever after, although he, having married again toward the close of his life, personally went out of his own house, and, with his wife, lived in another house, leaving his daughter and this defendant and another niece to live in the old home, as they had before.

After the transfer of the stock upon the books of the company to Miss Emmett a dividend was declared payable on October 1, and for that dividend, as well as for each succeeding dividend, a check was made out to her by the

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company, which she indorsed, and then, accompanied by Richardson's daughter, went regularly every quarter to Brayton Ives & Co., Richardson's stockbrokers, and delivered to them such checks, who thereupon, in every instance, credited the checks to Joseph Richardson's account.

November 11, 1890, Richardson filled up the power of attorney on the back of each certificate, signing at the end thereof the name "E. Emmett," which he caused to be witnessed by two witnesses, and on the same day these certificates of stock were surrendered to the railroad company, which issued new certificates of stock for 350 shares in the name of Mauriac & Bishop, who were then Richardson's stockbrokers, which shares were delivered to and held by them as security for his current indebtedness to them.

When the next dividend fell due Miss Emmett was informed, when she appeared at the office of the company, that there was no dividend for her. Thereupon she told Miss Richardson, who informed her father about it. He said it was all right and that he would give Miss Emmett a note to go and get her dividend, and she says he did write her a letter, which was taken to the Lackawanna Railroad Company's office, requesting the company to pay the dividend due January 1, 1891, to her, which it did, and the testimony was to the effect that this course of business was followed on each subsequent quarterly period down to and including the dividend of April, 1892.

May 6, 1892, Mauriac & Bishop indorsed the certificates standing in their name and surrendered them to the railroad company, which thereupon issued new certificates in the name of Emily Emmett. These new certificates, on or about the date of their issue, were again indorsed by Joseph Richardson but in the name of "E. Emmett," which he signed to the power of attorney on the back, and these certificates thus indorsed in blank were handed over to Mauriac & Bishop as security for Richardson's account.

In May, 1894, two of these certificates for 100 shares each

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were lodged by Richardson with the Atlantic Trust Company as collateral security for a loan, and after his death the stock was sold to settle the balance remaining unpaid on the loan, resulting in the surplus now the subject of controversy.

The learned referee found, in a short form of decision, that the defendant was entitled to recover, and judgment was entered accordingly, which was subsequently unanimously affirmed at the Appellate Division, and the only questions presented on this review are appellants' exceptions taken to the admission and rejection of testimony.

The defendant, while on the witness stand, was shown four stock certificates representing the 350 shares which were issued in the name of Emily Emmett by the direction of Richardson, and attention being particularly called to the date of their issue, August 21, 1885, and the date of the cancellation marks running from November 12 to November 22, 1890, the witness was asked: "Were those certificates at any time between those two dates (August, 1885, and November, 1890) in your possession?" Plaintiffs objected to the question as incompetent under section 829 of the Code, the objection being stated in full. But the objection was overruled and an exception taken, whereupon the defendant answered: "Yes, sir." The witness was again asked: "About what date were they in your possession?" This was followed by the same objection, ruling and exception, and the answer was: "About the autumn of 1885. Q. Where?" The same objection, ruling and exception followed, and the witness answered: "110 East Houston street," which was Richardson's home and where the defendant also resided.

This ruling of the learned referee is said to have been based upon the decision of this court in *Simmons v. Havens* (101 N. Y. 427), and is claimed to be fully justified by it, although it is quite apparent that very different use was made of the evidence in the case under consideration than the court thought possible in the *Simmons* case. In the latter

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case the theory of plaintiff's action was that her mother had conveyed to her the real estate upon which both of them resided, and that, subsequently, her mother, becoming angry, had taken the deed from the bureau drawer where it was kept and destroyed it, and conveyed the real estate to her brother. During the trial plaintiff, being on the witness stand, testified without objection that Havens "brought the deed to the house and threw it in her mother's lap, and, says he: 'There's Helen's (the witness') deed, and Mr. Lamport will be down * * * and take the acknowledgement.' She asked him if he had read the deed, and he said he had, that he felt interested who should have the premises back of him, and he had read the deed and it was all right. I did not read the deed then; I saw it in mother's possession and his." Then came the question which was considered by the court:

"Is it the same paper that subsequently came into your possession and which you read?" Defendant objected to the evidence, but it was received and an exception taken. "A. Yes, sir. Q. And the same paper you exhibited to Simmons and John Thompson? A. Yes, sir." When this court came to a consideration of the question presented by the foregoing exception, it had already, and after a careful review of the testimony, reached the conclusion that the judgment in favor of the plaintiff should be sustained, and the question actually presented was whether this ruling, under the circumstances, required a reversal of the judgment, and the reasoning of the court in effect was that no harm had resulted from permitting the witness to state that the deed was in her possession because, as the court said: "She was not asked, and did not state, from whom she received the deed. * * * The plaintiff might have received the deed from some third person." The theory of the court was that no harm was done, and, therefore, the judgment should not be reversed, not that the testimony was competent either to prove or to contribute toward establishing the fact of

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delivery. Such a holding, had it been made, would have seriously impaired the usefulness of section 829 of the Code, but it was neither made nor was it intended, for the argument, all of which I have quoted tended to show merely that no harm had resulted, and hence that a judgment right on the merits should not be interfered with.

That such evidence is not competent proof to establish the fact of delivery appears from the later case of *Clift v. Moses* (112 N. Y. 426) in which case it was important for the defendant to show the delivery of the notes to him—just as in this case it was necessary in order to make out a gift to show a delivery of the stock certificates to Miss Emmett—and these questions were asked of Moses: “Have you ever had the notes in suit in your possession?” “Did you see the notes in suit in November or December, 1875?” “Did you see the notes in the possession of your wife when Mr. Pardee was not present, or in your wife’s hands when Mr. Pardee was not present?” These questions were objected to and excluded under section 829 of the Code, and this court, in an opinion in support of this position by Judge Andrews, said: “The primary question is whether the evidence sought to be elicited by the questions put to Moses, touching the possession of the notes prior to Pardee’s death, was evidence concerning a personal transaction between the witness and Pardee. The evidence was very material upon the issue of payment. If the notes were in the possession of Moses prior to Pardee’s death, the presumption of payment would be very strong, and if he saw them in the possession of his wife in 1875 or 1876, or subsequently during Pardee’s lifetime, it would be a strong circumstance in corroboration of her testimony. The questions do not on their face call for a disclosure of a personal transaction of the witness with Pardee; and if it be the true construction of section 829, that a party may be a witness against the representative of a deceased party as to any fact which is not a narrative of an occurrence between the witness and the deceased, or if any

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fact may be proved by the survivor which does not involve on its face a direct statement of a transaction or communication between himself and the deceased, then the evidence of Moses was improperly excluded. But this literal construction of the section has not been adopted by the courts. It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction." By this process of reasoning the court necessarily reached the conclusion that if Moses had possession of the notes such possession must have originated in or resulted directly from a personal transaction with Pardee, and that unless the tendency of the evidence was in that direction it was necessarily immaterial, for it could have no value except in so far as it would tend to support an inference of fact that the notes were delivered to Moses by Pardee.

So, in this case, the possession by Miss Emmett of the certificates of stock in the autumn of 1885 had no materiality whatever, except for the purpose of establishing a delivery to her of the certificates after they had been issued in her name by the railroad company. And it tended to establish such a delivery and to permit an inference as to the nature of the transaction between her and Richardson when considered in connection with the fact that he had first caused stock which he owned and had paid for to be issued in her name by the railroad company. Under those circumstances, testimony by her to the effect that almost immediately afterward she had these certificates in her possession was in its effect testimony of both transaction and

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communication, as Judge Landon so well said in *Viall v. Leavens* (39 Hun, 291), in writing an opinion for the court holding it not permissible for an interested party, the decedent's wife, to testify that a deed made by her husband to a third party was delivered to her by the decedent, and that she retained possession of it, with short intervals, down to the time of the trial. Judge Landon said: "She therefore testified 'concerning' both transaction and communication, though she did not directly say she had either. The fact she spoke of was in no just sense independent of and extrinsic to the personal transaction and communication, but derived its chief significance from its dependence upon and intrinsic connection with both."

The reasoning of Judge Landon in that case as to the necessary effect of such testimony can have no better illustration than this case affords. When the learned referee came to consider whether the evidence established a complete and valid gift of the 350 shares of stock to Miss Emmett by Richardson he opened his discussion of the important element of delivery which must be established in such cases in these words: "In the present case the physical delivery of the thing given, being certificates of stock standing in the name of the donee put in her name by the donor, is, in my judgment, sufficiently proved by the evidence that the certificates of stock were in Richardson's possession late in the month of August and were shortly afterwards in the possession of Miss Emmett. There is no circumstance suggested from which a surreptitious delivery to her could be inferred, or a delivery by any person than by Richardson himself or some one acting under his instructions." We see, therefore, that the referee regarded this evidence as conclusively establishing the delivery of the stock by Richardson to Miss Emmett.

In the *Simmons* case (*supra*) the court thought no harm was done by admitting the testimony asserting possession, for the reason that, for aught the evidence disclosed, plaintiff

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might have received the deed from some other person than the deceased, and also because she did not state from whom she received it, while in this case the absence of such proof is laid hold of by the learned referee as tending to support an inference that the delivery to Miss Emmett was not surreptitious and that there was not a delivery to her of the certificates of stock by any other person than Richardson.

There can be little doubt, I take it, assuming, as we must, the evidence to be in the case for all purposes, that the deductions drawn from it by the referee are such as would be drawn by any reasonable man performing the duty of a trier of fact. The learned judge writing for the Appellate Division said, that while probably the possession of these certificates of stock was "competent evidence at the time it was introduced," it "was not evidence from which an inference could be drawn that the testator had delivered the stock to her" (citing section 829 of the Code; *Clift v. Moses*, *supra*; and *Matter of Humfreville*, 6 App. Div. 536).

The court was quite right in its view that section 829 of the Code was intended to prohibit a party covered by that section from testifying to a fact from which the inference must necessarily be drawn of a personal transaction between a testator and the witness, and the authorities cited by that court fully sustain such a position; but the flaw in the argument is in assuming that the evidence was competent at the time it was introduced—a flaw due, it is quite evident, to the assumption that the *Simmons* case requires the court to hold the evidence admissible while the other authorities and the Code burdened it with the necessity of depriving it of all probative force. It was clearly incompetent if it tended to support an inference of a delivery of the stock to Miss Emmett by Richardson, as the referee found it did, and as we think; indeed, it was not material or useful for any other purpose. Now, while testimony almost identical with this was said not to justify a reversal in the *Simmons* case (*supra*), we think, for the reasons already assigned, that the decision

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in that case should be confined to situations precisely like the one then before the court. Such, we think, the opinion shows to have been the intention of the court in that case, and such intention is further evidenced by a decision of the court made two or three years later in *Clift v. Moses (supra)*, in which the opinion in the *Simmons* case was not discussed.

It is perhaps unfortunate that this case must be reversed, but it is better far that it should be than that such a precedent should be created as would result from an affirmance of the judgment.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, VANN, MARTIN, CULLEN, and WERNER, JJ., concur; O'BRIEN, J., absent.

Judgment reversed.

MARY K. MORSE, RESPONDENT, v. PRESS PUBLISHING COMPANY, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—APRIL, 1902.

§§ 791, 793, 256, 977, 789, 790.

Preferences—Civil Actions—Section 791, Code Civil Procedure.

In the County of New York, civil causes specified in section 791 of the Code of Civil Procedure are not entitled, as a matter of right, to be advanced over causes noticed for trial for prior terms. The right to grant a preference over issues noticed for Trial Terms rests in the discretion of the court; but some other fact

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than that the action is one specified in section 791 of the Code must be shown to justify the court in preferring the action over such issues.

An order granting a preference in an action for libel over issues noticed for prior terms affirmed on the ground that the appellate court would not interfere with the discretion that has been exercised by the court below.

(Decided April, 1902.)

Appeal from an order granting a preference and setting the case down for the Call Calendar of February 14, 1902, in pursuance of rules 3 and 7 of the Rules of Trial Term.

James W. Gerard, for appellant.

John C. Rowe, for respondent.

INGRAHAM, J.—There is presented on this appeal the question as to whether the plaintiff in an action specified in section 791 of the Code of Civil Procedure is entitled as a matter of right to have his case advanced over cases noticed for trial for prior terms. In view of the large increase of the cases specified in this section of the Code the condition of the calendar has become such that a large part of each term of the trial courts is consumed in the disposition of the cases which are thus placed ahead of the other actions on the calendar, and slight progress is made in the call of non-preferred cases. It has undoubtedly been the unquestioned practice in this district to construe this section of the Code as giving to the parties to an action specified in section 791 the right to have the case advanced over cases previously upon the calendar; but this practice seems to have grown up without question, the number of actions within those specified in this section having been so limited that no substantial injustice was done. The right to have a case thus preferred is now questioned and we must determine that question by construing the provisions of the Code. Under the Code of Procedure as originally adopted it was contemplated that there would be a

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new calendar made up for each term of the court, and if any of the cases on the calendar were undisposed of at the end of the term they were to be renoticed for the ensuing term and a new note of issue filed (Code of Pro., sec. 256). There was no provision in the Code of Procedure providing for the preference of any particular case, but certain actions were by special statutes given a preference—such as issues of law, actions by the attorney-general in behalf of the People, *certiorari* proceedings and actions against corporations on notes or other evidences of debt for the absolute payment of money on demand. As business in the County of New York increased and it was found to be impossible to dispose of all the cases on the calendar by the end of each term, an amendment to section 256 of the Code of Procedure was adopted. There was added to that section a provision that in the First Judicial District there need be but one notice of trial and but one note of issue, and that the case should then remain on the calendar until disposed of without further notice; and that provision was continued in force in the Code of Civil Procedure as part of section 977 of that Code. That section provides for noticing a case for trial and that: "The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or of law, and, if an issue of fact, whether it is triable by a jury or by the court without a jury. * * * The clerk must thereupon enter the cause upon the calendar, according to the date of the issue. * * * In the City and County of New York * * * where a party has served a notice of trial, and filed a note of issue for a term at which the cause is not tried, it is not necessary for him to serve a new notice of trial or file a new note of issue for a succeeding term; and the action must remain on the calendar until it is disposed of."

There was also included in the Code of Civil Procedure an article relating to preferred and deferred causes. By

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section 789 it was provided that certain actions brought by the People are entitled, on the application of the attorney-general, to a preference over any other business at a term or sitting of any court of the State, irrespective of their places on the calendar. By section 790 this same provision is applied to criminal cases. There can be no question of the intention of the Legislature as to these two classes of cases. They were to be given a preference irrespective of the place they occupied upon the calendar, and could thus be moved out of their order at any time. By section 791 it is provided that civil cases are entitled to preference among themselves in the trying and hearing thereof in the following order. Then follow twelve subdivisions specifying certain actions that would seem to have been given certain preference, but on different conditions. Subdivision 1 applies to actions or special proceedings brought by or against the People of the State or against a State officer; in such an action or proceeding the attorney-general can give notice at the time of the service of the notice of trial or argument of a particular day in the term on which he will move it. If on that day the cause is not moved by the attorney for the State the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term except by the special order of the court. The same provision is extended by subdivision 2 to an action or special proceeding in which the City of New York or certain municipal officers are parties. Subdivisions 3 and 3a apply to appeals, and subdivision 4 applies to the Court of Appeals. Subdivisions 5, 6, 7, 8, 9, 10 and 11 provide that several special classes of action shall have a preference over other actions in the hearing and trial thereof.

In the Code of Civil Procedure as originally passed no method was prescribed by which a case should be given the preference provided for by section 791 of the Code. Section 793 of the Code provided that in the cases where the facts which constituted a right to a preference did not appear

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upon the pleadings or other papers upon which the cause was to be tried the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party." That section was amended by chapter 497 of the Laws of 1888, so as to provide that "No action or special proceeding shall be placed as a preferred cause upon the calendar of any Circuit Court or Trial Term or Special Term of any court, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court, at the opening thereof, for leave to move the same as a preferred cause. * * * The application for a preference shall be made at the opening of the court, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at the term at which the application is made, the court may direct that it shall be so heard." This provision applied to the whole State and made an application to the court necessary before any case could be preferred. This section was further amended by chapter 410 of the Laws of 1895, as follows: "Where no order is required, a claim for preference, specifying the provision of law under which the claim is made, may be inserted in the note of issue to be filed with the clerk. It shall be the duty of such clerk to place such cause in its proper place among the preferred causes at the head of the calendar; except that in the counties of New York and Kings and the Seventh Judicial District no action or special proceeding shall be placed as a preferred cause upon the calendar of any Circuit Court or Trial Term or Special Term of any court as herein provided, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court, at the opening thereof, for leave to move the same as a preferred cause. * * * In said counties of New York and Kings and the Seventh Judicial District the application for a preference shall be made at the opening

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of the court, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at the term at which the application is made, the court may direct that it shall be so heard." This section has been since amended by chapter 140 of the Laws of 1896 and chapter 172 of the Laws of 1900, but the provision, so far as it affects this county, has not been changed. We have in this provision of the statute a distinction between two classes of actions in which it was intended to provide for a preference. In one class of actions, in which the State or certain municipal corporations were parties, provision is made for moving a cause for trial upon any particular day in a term, irrespective of the position of the cause upon the calendar; certain other class of cases are given a preference upon the calendar in all counties of the State, except in New York, Kings, Queens and Erie and the Seventh Judicial District; the claim for a preference must be inserted in a note of issue to be filed with the clerk, and it was then the duty of the clerk to place such cause as a preferred case on the calendar. This provision was mandatory. The clerk had plainly no discretion. From this provision, however, the counties of New York, Kings, Queens and Erie and the Seventh Judicial District were expressly excepted, for in those counties no action or special proceeding was to be placed as a preferred cause upon the calendar. The mandatory provision which applied to the other portions of the State was not made applicable to these counties. In those counties, instead of mandatory provision by which the clerk was required to place the cause upon the Preferred Calendar, provision was made for an application to the court by a party claiming a preference for leave to move the same as a preferred cause; and "if upon such application it should appear that the cause is entitled to a preference and is intended to be moved for trial at the term at which the application is made, the court may direct that it shall be so heard." It seems to me that there is a distinction made between these two classes depend-

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ing upon the locality in which the action is brought. In one case the party claims his preference in his note of issue filed with the clerk, and the clerk is then required to place that action among the preferred causes for the term of the court at which the case has been noticed for trial. No application to the court is necessary; no discretion as to the granting of the preference is given, and it would appear that this provision applied to the counties of the State when a new calendar was made up for each term. As to the other counties, however, an entirely different system is provided. There the case was to go upon the calendar in its regular order. If either party to an action desires the cause to be taken out of its regular order and tried, he is required to make an application to the court for leave to move the same as a preferred cause in the manner and at the time prescribed by the Code. If it was intended that this provision should be mandatory, and the mere fact that the action was one of the classes embraced within subdivisions 5 to 11, inclusive, of section 791 entitled it to be tried before all other causes on the calendar, it is not apparent why an application to the court was necessary, as that question could have been determined by the clerk as in the other counties of the State. In these counties, however, an application must be made to the court for its judicial action. The court is then authorized to act upon that application. If it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice may direct that it shall be so heard. From this language we think that it was intended to give to the court a discretion as to whether or not the action in which the application is made should or should not be heard at that term of the court. The contrast between the mandatory provision in relation to the other counties of the State and the counties embraced within the provision which we are now considering is very marked. In one case it is made the duty of the clerk to place the cause upon the Preferred Calendar;

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its place is determined by the specific provision of the section; in the other the court is given authority to take the case out of its order on the General Calendar and dispose of it at a particular term of the court. There is no direction that the cause shall be taken out of its order and placed at the head of the calendar, but the court in such a case has authority to order it tried at the particular term at which the application is made. Whether or not it shall be or can be tried at such a term must necessarily depend upon the state of the business at that term and the judicial force then available for the trial of cases, the number of cases which has been especially set down for trial at the term, and the many other contingencies that arise affecting the transaction of business at a term of a court. In one case it was made the duty of the clerk; in another case authority is given to the court to try the case, although not reached in its regular order; but there is nothing in this provision that made it the duty of the court to set aside all of its other business and to proceed with the trial of a particular case because one of the parties has applied to the court that it should be so tried. The inherent power of a court to control its own calendar and to determine the order in which its business shall be performed would be a reason why the Legislature should give the court discretion as to when a case, though entitled to a preference as to a term for which the case was noticed, should be taken out of its order on the calendar and disposed of; and the words used when providing for the disposition of an application to have the case taken out of its order and tried at a particular term justify the presumption that such was the intention. It was not made the duty of the court to try the case at the time at which the application was made, but it was provided that the court "may" direct the action at such term. The condition of the calendar in New York at the present time shows how essential it is that in the disposition of the public business there should be a discretion as to whether or not any particular action should be taken

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out of its order and advanced ahead of the untried cases. The practice has been to grant such applications in actions specified in section 791 of the Code as a matter of course, and the consequence is that more than one-half of the time of the court each term is taken up in the trial of cases thus advanced, in many of which it is impossible to see that either the public interests or the interests of the particular litigants are such that they should be tried before other causes of the same general character upon the regular calendar. Take the case of a person who sues to recover for a personal injury; if the plaintiff is an infant he is entitled to a preference under section 791 of the Code. If an adult, no such action can be awarded. Where the injury results in death, his administrator suing for the benefit of the next of kin is entitled to a preference. If he is maimed for life so as to be perfectly helpless his case must take its turn upon the General Calendar. If the action is for libel it is entitled to a preference, while if it is for slander for repeating the same defamatory matter, it must take its place upon the General Calendar, and other causes might be instanced which would present the same result. Where a new calendar is made up each term is disposed of, no particular injustice is occasioned by putting cases specified in section 791 upon a preferred calendar. Where, however, it takes many months to reach a case upon the General Calendar, it is apparent that it is a great injustice to the general class of litigants to postpone the trial of their actions until all of the actions specified in section 791 of the Code are disposed of. A reason is, therefore, apparent why there should be a distinction between the several counties of the State, depending upon the amount and nature of the business to be transacted and the condition of the calendar, and why, as to the counties in which there are serious arrears in the trial of cases, the Legislature should leave it to the discretion of the court to be determined upon the character of the particular case moved and the condition of the public business ready to be transacted

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at a particular term as to whether any particular case should or should not be taken out of its order and tried. The question whether the word "may" is to be construed as mandatory or discretionary has been much discussed, but the general rule is that the ordinary meaning of the word is that there is involved a discretion, and it is to be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the Legislature; that where there is nothing in the connection of the language, or in the sense or policy of the provision to require an unusual interpretation, it will be given its ordinary meaning (20 Am. & Eng. Enc. of Law, 2d ed., p. 237), and that where, by the use in other provisions of the statute of mandatory words, it appears that the Legislature intended to distinguish between these words and "may," "may" will not be construed as imperative (id., 28). In the case of *People ex rel. Comstock v. City of Syracuse* (59 Hun, 258), affirmed by the Court of Appeals (128 N. Y. 632), Judge Martin states the general rule that "such exposition ought to be adopted as shall carry into effect the true intent and object of the enactment. The ordinary meaning of the word, which is permissive, ought to be adopted, and must be presumed to be intended, unless it would manifestly defeat the object of the provision"; and after a full review of the authorities, he says: "The decisions holding that permissive words should sometimes be construed as mandatory have been based upon the supposed intent of the Legislature. While general expressions have been used which, when taken alone, might seem to indicate that the word may, or words of similar import, should be construed as mandatory when the public interest or the rights of individuals are involved, independent of any question of legislative intent, still, when the cases are examined, it will be seen that such construction has prevailed only in cases where the statute under consideration, when taken as a whole and viewed in the light of surrounding circumstances, indicated a purpose on the

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part of the Legislature to enact a law mandatory in its character." In *Cain v. The City of Syracuse* (95 N. Y. 83) Judge Finch said: "We must consider the nature and scope of the duty, and in so doing must not be misled by the test which makes permissive words absolute and a command. That test is applicable only to solve a doubt and determine between a ministerial and judicial duty when such a duty may possibly belong to either class, but will not serve to make a duty which is inherently and inevitably discretionary, nevertheless ministerial because the public have an interest in its exercise or the rights of individuals may be affected by it."

We have here in this case the reference of a question to a court which necessarily involves judicial action. The question to be determined is as to whether a particular case should be advanced over other cases upon the calendar and tried at a particular time. The rights of the litigants, other than those of what have been called the preferred class, are at issue as well as the rights of the parties to the action in which the application is made. Under this section the court is bound upon such an application to determine that judicial question; but when the Legislature says upon such an application it may grant a preference, it would seem that it was intended that the court to which the application is made should exercise its judicial discretion in determining whether the application should be granted. Assuming it to have been discretionary with the court below, should we on this appeal reverse the exercise of that discretion?" This action was for libel and within subdivision 11 of section 791 of the Code. The plaintiff moved for a preference upon an affidavit alleging the nature of the action. In opposition to this motion an affidavit was presented showing that this action was first noticed for trial at the November 19 term; that upon the General Calendar the last case was number 3374, which was noticed for trial for the June term, 1899; that the months of June and October, 1901, had been occupied exclusively with preferred causes or old causes which

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had been previously called; that the number of the last case noticed for October, 1901, was 12299. No special reason was given why this case should be preferred over those cases noticed for June and October, 1899, except the fact that it is an action brought to recover damages for a libel. In October, 1901, the cases noticed for June, 1899, had not had an opportunity for trial, and it was asked that this action, first noticed for November, 1901, should be preferred over all the other cases upon the calendar waiting for trial upon the sole ground that the action is brought to recover damages sustained by the plaintiff in consequence of a libelous publication in a newspaper. Was there any fact here presented that justified the court in the exercise of its discretion in taking this case out of its order on the calendar and trying it in the November term, 1901? It would seem that there was none, except that the Legislature had included actions for libel in section 791 as actions which would be as between other actions entitled to a preference; but there is nothing in the section that requires the court to give an action for libel, first noticed for trial for the November term, 1901, a preference over other actions noticed for trial for June and October, 1899, and while it might well be that the public interests or the condition of the parties to a particular action, as where the settlement of an estate requires that the action should be disposed of, would justify the court in giving to a case such a preference and in requiring all other actions upon the calendar ready for trial to be postponed until the case could be tried, the mere fact that the action is for libel does not, we think, justify the court in giving it such a preference. It would undoubtedly be entitled to a preference over cases noticed for the same term, but giving it a preference over cases ready and noticed for trial for over two years would seem to be without justification. The learned trial judge who granted this application undoubtedly relied upon the general course of practice to which attention has been called; but we have discussed this question at length,

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as it will settle a calendar practice in this department upon which undoubtedly the ordinary practice has been opposed to the views that we have here adopted.

There is nothing in the case of *Hayes v. Consol. Gas Co.* (143 N. Y. 641) which affects this question. It was there determined that a refusal of the court to grant a preference, to which the plaintiff claimed she was entitled under section 791 of the Code, where such claim was not opposed by the defendant, was not appealable to the Court of Appeals; that where a trial judge refused to try her case when she claimed she was entitled to have it tried, her remedy was not by appeal, but by *mandamus* to compel him to do his duty. The construction to be given to these sections of the Code was not before the court or discussed in the opinion.

In the case at bar, the court below having exercised its discretion, we do not care to interfere with it, and the order should be affirmed, with \$10 costs and disbursements.

VAN BRUNT, P.J.; McLAUGHLIN and HATCH, JJ., concur.

McLAUGHLIN, J. (concurring).—This appeal challenges the regularity of the practice which has long prevailed in this department of giving statutory preferred causes preference at each new term of court over non-preferred causes on the General Calendar noticed for trial at preceding terms.

This is an action for libel. Issue was joined herein on the 24th day of June, 1899. The case was duly noticed for the November term, 1901, and with notice of trial the plaintiff served a notice of motion for a preference for the first day of the term. The motion was granted and the cause, which is No. 12368 on the General Calendar, was ordered placed at the foot of the Friday Call Calendar, to be called as provided in rule 7.

The contention of appellant is that these preferred causes have a preference only over the non-preferred causes noticed for the same term and that they cannot be taken up until all causes upon calendars for previous terms have been dis-

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posed of. The question hinges on the construction of that part of section 977 of the Code of Civil Procedure which reads as follows:

"In the counties of New York, Kings, Queens, Richmond, Albany, Erie, Monroe and Onondaga, where a party has served a notice of trial and filed a note of issue for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial or file a new note of issue for a succeeding term, and the action must remain on the calendar until it is disposed of."

As to the First Judicial District this is a substantial enactment of section 256 of the Code of Procedure. The other counties have been included by amendments enacted from time to time commencing with the County of Kings in 1882 (chap. 96, L. 1882). The appellant claims that the proper construction of this provision of the law is that in New York and the other counties where causes are only required to be noticed once and only one note of issue is required to be filed, those causes remain upon the calendar prepared for the term for which they were noticed originally and that they must be tried, whether reached at that term or not, before any cause, either preferred or non-preferred subsequently noticed can be brought on. If this had been the intention of the Legislature I think it would have been expressed in more appropriate language. The Legislature has not provided that no new calendar shall be prepared for succeeding terms until the old calendar is exhausted, but, on the contrary, it has expressly provided by this section (977) that a calendar shall be prepared for each term of court. It is obvious, I think, that the sole purpose of this enactment was to relieve attorneys of the useless but exacting formality of frequently filing notes of issue and noticing their causes in counties where there are large calendars and many terms of court, and where the trials of issues were often delayed and the rights of litigants prejudiced either by an omission to refile a note of issue or renotice a cause,

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or the right to move a cause at a pending term was lost by noticing it for a future term without reservation. The Legislature, I think, merely intended that in making up each new calendar the clerk should add thereto, without the filing of a new note of issue, causes regularly placed on the preceding calendar but which had not been disposed of. This construction leaves the practice uniform throughout the State as to the preference of preferred causes over non-preferred causes, no matter how often on previous calendars. The only difference being with reference to the manner of securing the preference. In the counties of New York, Kings, Queens, Erie, and in the Seventh Judicial District, the causes are placed on the calendar according to dates of issue and preference is obtained by motion, while in the other counties they are placed at the head of the calendar as preferred causes. The construction contended for by the appellant imputes to the Legislature an intention, by these amendments, to change the rules of preference which are prescribed in other sections of the Code and to attach a penalty to a failure to notice a cause for the first term after issue joined. If the construction contended for the right to such preference being claimed in the note of issue (C. C. P. 793) by the appellant prevailed, then the Legislature intended to provide that all issues noticed for a particular term in the counties specified should be tried at that or succeeding terms before any cause, preferred or non-preferred, with certain exceptions not necessary to be considered, should be taken up. In all other counties of the State, however, where causes must be renoticed and new notes of issue filed for each new term, it is conceded that all issues go upon the same calendar and that the last issue, if preferred, takes preference over the earliest, if not preferred. But this inconsistency would be one only of the absurdities that would result from such construction. In the last mentioned counties, if a cause be not ready for trial at a particular term, a party incurs no penalty in not noticing it or in moving it off

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the calendar if his opponent notices it. In either case the cause goes upon the next calendar in its proper place according to the date of issue. According to appellant's contention, however, if a cause be not noticed for a term in New York and the other counties classified with it in that regard, the result is entirely different. Not only is the right to move the cause at that term lost, but its trial must be deferred until all causes noticed or on the calendar for that term are first tried. When we consider that unless a cause is ready for trial a party cannot safely notice it for the first term after issue joined, because noticing it estops him from pleading that he is not ready for trial except for cause arising or coming to his knowledge subsequently, it seems manifest that the construction contended for by appellant is erroneous. We think that the true construction is that which has always prevailed in this department and throughout the State, except in Kings County, where it has been recently changed by the decision in *Schuman v. Brooklyn Heights R.R.* (71 N. Y. Supp. 1095, *aff'd* on argument without opinion, 64 App. Div. 620). We are not, I think, under any obligation to follow the *Schuman* case and change what I deem the correct calendar practice which has heretofore prevailed in this department.

I have examined the other provisions of the Code relating to preference in civil and criminal causes, both at Trial Term and on Appeal (Code Civil Procedure, secs. 789, 790, 791 and 793), and we find nothing therein which militates against the construction here indicated.

The fact that it has not been the practice in this district to prepare a new calendar for each term of court, as required by section 977 of the Code of Civil Procedure, cannot affect the proper construction of the statute with reference to preferences. Although the question before us is not whether these calendars must be printed, it may be observed that the non-compliance with the law in that regard has prejudiced no one and has resulted in a large saving of money to the

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taxpayers. In the County of New York, which constitutes the First Judicial District, new Trial Terms, consisting of many parts, commence on the first Monday of each month, except the months of July, August and September. The General Trial Calendar is so large that, except in causes which are preferred, issues of less than two years' standing have not yet been reached for trial. Of what use or benefit would it be to the court or to the litigants, whose causes cannot be reached, or to their attorneys, for the city to incur the enormous expense of printing new calendars, involving all the issues, new and old, for each new term of court? For the purpose of obviating this unnecessary expenditure of money this court has prescribed by rule 1 of the Trial Term rules that a general calendar shall be made up from time to time as ordered by this court; that it shall be the calendar for the several Trial Terms until a new calendar is ordered to be made; that causes subsequently noticed for trial in which notes of issue are filed shall be added to the General Calendar at the foot thereof. This rule, except in so far as it dispenses with the preparation of new calendars, is entirely consistent with the provisions of the Code relating to the preparation of calendars and the giving of preferences. How else could the newly noticed issues have been added? It would not be practicable to prepare a skeleton calendar to provide for the insertion of such causes in the proper places for the term next after their being noticed. It may be that the rule has been improperly construed, and that causes thus added at the foot of the General Calendar have not been given their proper place according to their dates of issue in preparing a list of the causes for the Call Calendars; but, even if so, that does not affect the question now under consideration. Trial Term rule 3, which is fully authorized by section 793 of the Code of Civil Procedure, provides that where a preliminary order for a preference is necessary the application therefor shall be made at Part II of the Trial Term, and that if the appli-

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cation shall be granted the court shall direct the cause to be placed on the Friday calendar to be called as provided in rule 7. Rule 7 provides in substance for a calendar call on Friday of each week for the purpose of preparing a calendar of issues to be tried in the several Trial Terms the week following. Provision is made for publishing notices of a list of the causes to be so called. This embraces all preferred causes where the right to preference has been preserved, and such number of the non-preferred causes as are deemed sufficient to keep the courts in business for the time specified. The proper construction of these rules is that all preferred causes, where the right of preference has been secured, which have been duly noticed and in which notes of issue have been filed at any term prior thereto, shall be placed on the Call Calendar, and that in addition thereto the requisite number of non-preferred causes shall be taken from the General Calendar according to the dates of issue regardless of whether they were on the General Calendar when originally prepared or have been added at the foot. In the case at bar the right to a preference is granted by subdivision 11 of section 791 of the Code of Civil Procedure, and the court has directed that it be heard as a preferred cause pursuant to the provisions of section 793 of the Code of Civil Procedure and the rules made thereunder. In these circumstances it is conceded in the prevailing opinion that this issue must be given preference; but that opinion declares that in the County of New York, and certain other counties, the right of preference in causes specified in section 971 of the Code of Civil Procedure is not absolute, but rests in the discretion of the court. In this view I do not concur. The decision of the court in determining the existence of the facts upon which the right to a preference is based, and also in determining whether it is intended to move the cause for trial at the ensuing term, doubtless rests somewhat in discretion; but where the facts are undisputed or are found in favor of the moving party, then the right to a preference is abso-

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lute. In other words, the statute is mandatory, not directory; and the discretion of the court is confined to passing upon the facts. These statutory provisions for preference have always been construed as giving an absolute right to a preference, and I see no reason for giving them a different construction now. One of the innumerable evils that will result from construing the statute as vesting the whole matter in the discretion of the court, with a suggestion that preferences ought to be refused, is that the settlement of estates in litigation will be delayed indefinitely. Many other apparent difficulties might be pointed out, and still others not now apparent will arise from a construction of the statute which, in my judgment, overthrows the will of the Legislature.

It follows that the order appealed from was authorized and it should be affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, v. EDWARD J. DOOLEY, HENRY J. FURLONG, JOHN NAUMER AND FRANK E. O'REILLY, RESPONDENTS, IMPLEADED WITH OTHERS.

COURT OF APPEALS—MAY, 1902.

§§ 1948, 1954.

Constitutional Law. City Magistrates in the City of New York.

The provisions of the Revised Charter of the City of New York (sec. 1392, chap. 466, Laws of 1901), that magistrates in the First Division of the city shall be appointed by the mayor, and that those in the Second Division shall be elected, are unconstitu-

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tional; being violative of section 17, article 6, of the constitution, which provides that such judicial officers shall be chosen by the electors of the city, or appointed by some local authority thereof. The constitution contemplates that their manner of selection shall be uniform throughout the city, that is, by one or the other of the methods named.

Upon the expiration of the terms of office of magistrates for the Borough of Brooklyn, on the last day of April, 1901, the mayor of the city appointed their successors by certificates which recited that they were appointed "for the unexpired portion of the term, which commenced May 1, 1901, and which ends December 31, 1902"; the limitation expressed in the certificates having been inserted upon the assumption that the above provision of the revised charter was valid. *Held* that the appointments were properly made under the power conferred upon the mayor by the charter of 1897, and, inasmuch as that law fixed the terms of the appointees at ten years, the limitation inserted in the certificates should be regarded as surplusage and they would hold for the full term fixed by law.

The section is also void in its requirements for the election of city magistrates in the Borough of Brooklyn by congressional districts; being violative of the above constitutional provision that judicial officers in cities, other than justices of the peace and district judges, "shall be chosen by the electors of such cities, &c.," which means all of the electors of the city.

(*Decided May, 1902.*)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department affirming an interlocutory judgment entered upon a decision overruling a demurrer interposed by the plaintiff to the answer of the above-named defendants.

This appeal is taken by permission of the Appellate Division upon two questions certified to this court for decision: First. "Whether the demurrer to said answer ought to have been overruled." Second. "Whether the provisions of the charter of the Greater New York, under which elections were had of city magistrates in the Borough of Brooklyn, City of New York, at the general election in 1901, were unconstitutional."

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James McKeen, William J. Carr and George W. Wingate,
for appellant.

*David B. Hill, John L. Hill, Jerry Wernberg and Robert
H. Elder,* for respondents.

WERNER, J.—This action is in the nature of *quo warranto*, brought by the attorney-general upon his own information, pursuant to section 1948 of the Code of Civil Procedure. The action is primarily against certain persons alleged to have usurped and entered into the office of city magistrates in the boroughs constituting the Second Division in the City of New York. Pursuant to section 1954 of the Code, the persons who claim to have been elected to said offices, and rightly entitled thereto, are also made defendants. The allegations of the pleadings need not be recited, since they are sufficiently indicated by the facts which must be discussed in connection with the questions of law to be decided. Suffice it to say that the complaint proceeds upon the theory that under section 1392 of the revised charter of New York City, enacted in 1901, there was a valid election in the fall of that year at which certain persons were elected to the office of city magistrates in the boroughs of Brooklyn, Queens and Richmond, who are prevented from discharging the duties thereof and receiving the emoluments belonging thereto by the unlawful usurpation of said office by the defendants above named. Said defendants, by their answer, challenge the constitutional validity of said charter provision: and allege their own legal incumbency of said office pursuant to legal appointments made prior to said election. To this answer the plaintiffs interposed a demurrer on the ground that it is insufficient in law. The demurrer was overruled and from the interlocutory judgment entered upon that decision the plaintiffs appealed to the Appellate Division, where it was affirmed by a divided court. The questions certified to this court involve not only the suffi-

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ciency of the pleading, but the serious constitutional questions which underlie the action.

For the purposes of administration of criminal justice, the greater City of New York, under its original charter, enacted in 1897, was divided into two divisions. In the First Division were the boroughs of Manhattan and the Bronx; in the second, the boroughs of Brooklyn, Queens and Richmond (sec. 1390). When said charter went into effect the office of city magistrate was in existence in the former City of New York, having been established by chapter 601 of the Laws of 1895. Section 1392 of said charter provided that the city magistrates in office when it took effect should continue to hold their office until the expiration of their respective terms, and should be known as the city magistrates of the First Division; that their successors should be appointed in the same manner and have the same powers and duties as provided by said chapter 601, Laws of 1895. The act just referred to provided that such magistrates should be appointed by the mayor for terms of ten years. On account of the different conditions which prevailed in the boroughs of Brooklyn, Queens and Richmond, the charter provisions relating to the office of city magistrate in these boroughs were more elaborate than those above summarized. It was provided that the police justices in the former City of Brooklyn, who should be in office on the 31st day of January, 1898, should continue in office until the expiration of their respective terms, but should thereafter be known as city magistrates of the Second Division of the City of New York, and have the powers and duties thereafter prescribed for city magistrates, and no other; that additional magistrates should be appointed, who should be residents of the boroughs of Queens and Richmond respectively, and (sec. 1394) that "the successors of said magistrates shall at all times thereafter be appointed by the mayor of said city, and shall be residents and electors of the borough from which said magistrates whom they shall be appointed to succeed were appointed, and shall hold office for ten years."

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In section 1396 the powers of city magistrates in said Second Division were defined as follows: "The said magistrates appointed or continued in office pursuant to this title shall have and exercise within the said Second Division such powers as are conferred by law upon the city magistrates in the City of New York, by chapter 601 of the Laws of 1895, and the acts amending the same, except as herein otherwise provided."

Section 3, chapter 601, Laws of 1895, provides: "On and after the 1st day of July, 1895, the city magistrates appointed pursuant to this act shall have and shall exercise all the powers and jurisdiction, not inconsistent with the provisions of this act, which on the 30th day of June, 1895, shall be vested by law in the police justices, except proceedings respecting bastards."

Thus far we have a uniform system under which city magistrates were to be appointed in both divisions of the Greater New York. Broadly stated, their powers were the same as those formerly possessed by the police justices in the old City of New York.

In 1901 the Legislature revised the charter of Greater New York (chap. 466, Laws 1901). It provided for the election of city magistrates within the Borough of Brooklyn in lieu of their appointment. Section 1392 of the revised charter provides: "At the general election to be held in the Borough of Brooklyn, in the year 1901, there shall be elected in each congressional district, as then constituted in said borough, one city magistrate, and in the territory constituting the Borough of Brooklyn there shall be elected two city magistrates at large, and the terms of office of all said city magistrates so elected shall commence on the 1st day of January, 1902, and continue for six years thereafter." In the boroughs of Manhattan and the Bronx the city magistrates were to be appointed by the mayor, as before. Under this provision city magistrates were elected in the Borough of Brooklyn at large and by congressional districts as therein provided. This con-

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test, as above stated, is between the defendants, who claim to have been thus elected and the four answering defendants, who claim to hold said office by appointment.

The constitutional provision which the said appointed magistrates invoke in support of their claim that the amendment of the charter in 1901 is unconstitutional is the last clause of section 17 of article 6, which reads as follows: "The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the Legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the peace and District Court justices may be elected in the different cities of this State in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; *all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.*"

Assuming that this section of the constitution applies to the case at bar, we see no escape from the conclusion that the charter amendment of 1901 is unconstitutional. The mandate of the constitution is that judicial officers in cities, whose election or appointment is not otherwise provided for, shall be chosen *by the electors of such cities or appointed by some local authorities thereof*. This language is plain and unequivocal. It presents two distinct alternatives. Either may be chosen. It must be one or the other. If the office is to be filled by appointment, the agency by which that is to be accomplished is broadly, yet clearly, designated. If the

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officer is to be elected, the power of appointment is as plainly excluded. If this is not the fair and reasonable construction of this provision of the constitution, then it is within the power of the Legislature to authorize the employment of both methods at the same time, in the same territorial or civil division, or in different divisions, either to suit the caprice of a day or the exigencies of a political condition. If judicial officers of the same grade, performing the same duties in the same local division, may be appointed in part and elected in part at the same time, we shall not have long to wait for such use of the power as will serve the selfish ends of the designing few at the expense of the public weal. If magistrates may at the same time be appointed in the Borough of Manhattan and elected in the Borough of Brooklyn, why may they not be elected in one part of a borough and appointed in another? And if this may be done what becomes of the system by which two boards of magistrates are created in the two divisions of the Greater New York, designated to promote unity and cohesion in the administration of criminal justice in the city at large?

Under the charter of 1897 there was uniformity of tenure, jurisdiction, and method of selection. Under the charter of 1901 the same officers are to be selected by different methods for terms of different duration, and if this is valid they may also be invested with different jurisdiction. Under the original plan each elector who exercised his right of franchise had an equal part in the selection of all the magistrates, through his vote for the mayor, who appointed them. In the present situation the electors of the Borough of Brooklyn have the right, in common with the electors of the Borough of Manhattan, to vote for the mayor, who appoints the magistrates in the First Division; and also to vote, both by districts and at large, for the magistrates in their own borough, although that right is denied to the electors of the First Division. There has been no exercise of the discretion vested in the Legislature by section 17, article 6, of the constitution. In

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the creation and continuance of this court two methods have been combined, so that neither has been distinctly adhered to, notwithstanding the imperative constitutional command that one or the other, not both, shall be followed. In *Matter of Gage* (141 N. Y. 117), Judge Finch, speaking of article 10, section 2, of the constitution, which provides that certain officers "shall be elected by the People *or* appointed as the Legislature may direct," says, "that is, in such cases it may choose between election and appointment, and in the latter event may dictate the authority and mode of appointment." In *People ex rel. Goring v. President, &c., of Wappingers Falls* (83 Hun, 135), section 104 of the Election Law was construed. In speaking of the character of the office in controversy, Judge Cullen said: "The office here in dispute is a local office. By the constitution it must be filled by election *or* appointment as the Legislature shall direct, * * * and it is only *one* of these two methods that the Legislature can adopt."

Does section 17 of article 6 of the constitution apply to this case? The single question thus far discussed is whether the charter amendment of 1901 violates that feature of said article and section of the constitution which requires the Legislature to adopt one or the other of the two alternatives therein set forth in the method of selecting "judicial officers in cities whose election or appointment is not otherwise provided for." Upon that question the constitutional provision above referred to seems to be clearly applicable. But, even if it were not, the case would be governed by the similar provisions of section 18, article 6, or section 2, article 10, of the constitution, the first of which declares: "Except as herein otherwise provided, all judicial officers shall be elected *or* appointed at such times and in such manner as the Legislature may direct," and second of which provides that "all city, town or village officers whose election *or* appointment is not provided for by this constitution shall be elected by the electors of such cities * * * *or* appointed by such authority thereof as the Legislature shall designate for that purpose."

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Thus we see that in one respect at least all the constitutional provisions which, by any possibility, can apply to the charter amendment of 1901, are in accord as to the method of selecting public officers whose election or appointment is not otherwise provided for. They must be elected *or* appointed. The same office cannot be elective and appointive at the same time and place. This is equally true whether certain provisions of the constitution are regarded as purely retrospective and contemporaneous or prospective as well; for, as we have seen, every provision of the constitution upon this subject, whether dealing with the past, present or future, makes it clear beyond dispute that election *or* appointment are alternatives and not coincidents. In this view of the case it is unnecessary to discuss the questions whether the office of city magistrate in Greater New York is an old office with a new name or a new office; whether the provisions of section 17, article 6, of the constitution are retrospective and those of section 18 are prospective; whether, in case such magistrates are to be elected, the franchise must be given to all the electors in the city at large under said section 17, article 6, or may be divided into districts in such manner as the Legislature may direct under said section 18. Having arrived at the conclusion that the charter amendment of 1901 is unconstitutional, in so far as it provides for the appointment of city magistrates in the First Division and for their election in the Second Division, we might well refrain from discussing all other questions that may become purely academic in the course of events that must follow this decision; but since some of our brethren think we ought to decide the question whether it was constitutional to elect magistrates by districts, we may add that we fully concur in the opinion of Judge Cullen upon that question.

One other consideration remains to be noticed. The charter amendment of 1901 not only provided that city magistrates in Brooklyn should be elected instead of being appointed, but it also assumed to extend the terms of four city magistrates in office when it took effect. The terms of these officers ex-

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pired on the last day of April 1901, but the amendment purported to extend their terms until January 1, 1902 (sec. 1392). This provision was held to be constitutional in a decision which seems to have been acquiesced in by all concerned (*Matter of Kelly v. Van Wyck*, 35 Misc. Rep. 210). Upon a writ of *mandamus* commanding the mayor to appoint successors to the four magistrates whose terms expired on April 30, 1901, the four respondents herein were appointed. The certificate in each case recited the appointment to be "for the unexpired portion of the term which commenced May 1, 1901, and which ends December 31, 1901." The limitation of time expressed in these certificates was undoubtedly based upon the erroneous assumption that the charter amendment of 1901 (sec. 1392) was valid. Under the law of 1895, as amended in 1897, which was the law in force when the invalid amendment of 1901 was enacted, the term of the office of city magistrate is ten years. No valid appointment can be made for any other term, except in case of a vacancy occurring otherwise than by expiration of a term, in which event the person appointed to fill the same shall be appointed for the unexpired residue of the term. It is, therefore, obvious that the appointments of the answering defendants are either absolutely void, or the attempted limitation of the term set forth in their certificates is a nullity which may be treated as mere surplusage. We take the latter view. The only actual power which the mayor had in the premises was to make appointments for terms of ten years. It was his purpose to make such appointments as he supposed he had the right to make. He followed the letter of the statute as he thought it to be. The limitation inserted in the certificate was not based upon a design to make a temporary appointment which, if not authorized, would be wholly void, but upon a misapprehension as to which of two statutes, the one void and the other valid, should be followed in making the appointments. Under these circumstances, the case does not fall within the rule laid down in *People ex rel.*

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Bridgeman v. Hall (104 N. Y. 177), where the Mayor of Troy attempted to make a temporary appointment to the office of chamberlain in the place of the regular incumbent, who was then stated to be absent from the city and supposed to be a defaulter. In that case the mayor had two powers. The one, in case of a vacancy in the office of chamberlain, to nominate for a full term; the other, during the absence of the incumbent, to make a temporary appointment. He attempted to exercise the latter when he should have exercised the former. The error was induced, in part at least, by a mistake as to the existence of extrinsic facts which had a controlling effect upon the validity of the appointment. Upon the facts of the case this court held the temporary appointment void and that it did not inure as an appointment for the full term. But the court was careful to distinguish the case from *People ex rel. Andrews v. Lord* (9 Mich. 227) and *Stadler v. City of Detroit* (13 id. 346), and said: "There the appointing power attempted to exercise a power of appointment clearly defined, but by inadvertence of misapprehension put a limitation upon the appointment which was unauthorized."

A glance at the cases above cited will suffice to show that they cover the question here involved. In the *Lord* case the Governor of Michigan made an appointment to fill a vacancy in the office of probate judge created by the death of the incumbent who had been re-elected, but died before the commencement of his new term. On the succeeding 1st of January, when said new term was to commence, the governor made another appointment upon the supposition that there was a new vacancy. The constitution provided that in case of a vacancy the governor is to appoint a person to continue "until a successor is elected and qualified." Under that provision it was held that the second appointment was void and that the first was good "until a successor is elected and qualified." In the *Stadler* case the term of office of the marshal for the City of Detroit as fixed by charter was two years. *Stadler* was appointed for a year and gave a bond covering that period. At

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the expiration of the year he was removed, not in terms, but by the attempted appointment of a successor. The court held that Stadler's appointment was good for two years; that the recital in the bond of one year was surplusage and that Stadler was entitled to the salary of the office. We think that the appointments of the answering defendants were valid for the full term of ten years and that the limitations attempted to be fixed thereto should be treated as surplusage.

For the foregoing reasons the order of the Appellate Division and the interlocutory judgment herein should be affirmed, with costs, and the question certified to this court should be answered in the affirmative.

CULLEN, J.—While concurring in the opinion of Judge Werner, I think the legislation in review before us conflicts with the constitution in another respect than that passed upon by him, in that the statute of 1901 (chap. 466) provides for the election of city magistrates in the Borough of Brooklyn by congressional districts, while section 17, article 6, of the constitution requires that all judicial officers in cities, other than justices of the peace and district judges, shall be elected by the electors of the city or appointed by some local authorities thereof. A perusal of this section shows a marked change in the phraseology used with reference to three classes of officers. First. "The electors of the several towns shall" elect justices of the peace. Second. Justices of the peace and district court justices "may be elected * * * in such manner * * * as are or shall be prescribed by law." Third. Other judicial officers in cities "shall be chosen by the electors of such cities, or appointed by some local authorities thereof." There is no provision in terms as to who shall elect justices of the peace and district court justices in cities, while it is expressly directed that justices of the peace shall be elected by the electors of the town, and judicial officers in cities other than justices of the peace and district court justices shall be elected by the electors of the cities in

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case the offices are filled by election. "The electors" of the State or of any of its political divisions means all the electors. The constitution provides that the members of this court shall be chosen by the "electors of the State," justices of the Supreme Court by the "electors of the several existing judicial districts," and county judges and surrogates by "the electors of their respective counties." No one would seriously assert that the Legislature could authorize judges of the Court of Appeals to be chosen by districts, justices of the Supreme Court by counties in the judicial districts, or county judges and surrogates by towns. In fact, even if the constitution had failed to prescribe in terms that the officers named should be elected by the electors of the State, judicial district or county (it does not so prescribe as to the governor and the lieutenant governor), I should be much inclined to the belief that the principle underlies our form of government that all public officers must be elected by constituencies coextensive with their jurisdiction, unless express provision is made to the contrary, as in the instance of justices of the Supreme Court. The case of a legislative body or board of a municipality whose members are chosen by districts is no exception to the rule, for it is only in their aggregate character that such members constitute a municipal authority (*Rathbone v. Wirth*, 150 N. Y. 459). The constitution itself recognizes this principle, for when it transferred judges of the various Superior City Courts to the Supreme Court it prescribed that they should hold court only in the counties by the electors of which they had been originally chosen to office.

But we are not without authority on the interpretation of this very section of the constitution. In *Brandon v. Avery* (22 N. Y. 469) the validity of a statute authorizing the election of a police justice in the town of Ilion, who "in said village" should possess all the jurisdiction, power and authority of a justice of the peace of the town of German Flats, was challenged. The statute was upheld on the ground that it was intended to confine the jurisdiction and power of the justice

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exclusively to the limits of the village. Judge Comstock there said: "It is urged that the charter of the Village of Ilion attempts to create an additional justice of the peace for the town of German Flats, to be chosen by only a portion of the electors of that town. If this were true the statute would doubtless be unconstitutional (Const., art. 6, sec. 17)." In *Waters v. Langdon* (40 Barb., 408) the statute provided that a police justice elected in the Village of Whitesboro should have the same power and jurisdiction as justices of the peace in the town of Whitestown without the qualification "in said village" found in the *Brandon* case. It was held that the effect of this statute was to authorize a part of the electors of the town of Whitestown to choose an additional justice of the peace of such town, and that, therefore, it was unconstitutional and void. This case is cited with approval in *Geraty v. Reid* (78 N. Y. 64). If "the electors" of a town mean all the electors of the town it is difficult to see why the term "the electors" of a city does not mean exactly the same thing.

I do not mean to say that police justices might not legally be chosen by districts in a city. The constitution authorizes justices of the peace and district court justices in cities to be elected in such manner as may be prescribed by law. At the time of the enactment of this constitutional provision (1869) these officers, in the then cities of New York and Brooklyn, were elected by districts. Their courts were local in their character. They were held in the districts, and in many respects their jurisdiction was confined to such districts. In what district it was necessary to bring a suit depended in some measure, at least, on the residence of the parties with reference to the district. My recollection is that the jurisdiction of the district courts in the City of New York was exclusively civil, but not so with justices of the peace in Brooklyn, who could and did act as criminal magistrates. The constitution does not prescribe what the jurisdiction of these justices must be. I think that the Legislature might create in cities district

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criminal courts as well as district civil courts, with justices to be elected by the electors of the district. But in such case the courts must be really district courts; that is to say, courts held for the districts, and the jurisdiction of whose magistrates is in some way limited to, or at least connected with, the districts, of which there is not a trace in the present case. If this view be correct we are not troubled with any fear that our decision may obliterate the City Court of New York. The judges of that court are elected by the voters of the old City of New York, the present Borough of Manhattan. But the jurisdiction of the court is confined to that borough, and the election of its judges in the present manner can well be upheld on the ground that it is a district court within the Constitution."

BARTLETT and HAIGHT, JJ. (dissenting)—We are unable to agree with the prevailing opinion, which pronounces unconstitutional section 1392 of the charter of Greater New York as amended in 1901 (chap. 366 of the Laws of 1901) on the ground that it is in violation of article 6, section 17, of the constitution.

We are of opinion that the Legislature, in amending this section of the charter, derived its power from article 6, section 18, of the constitution, which reads: "Inferior local courts of civil and criminal jurisdiction may be established by the Legislature, but no inferior local court hereafter created shall be a court of record. The Legislature shall not hereafter confer upon any inferior local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed *at such times and in such manner as the Legislature may direct.*"

This section of the constitution contemplates and authorizes, among other things, the establishment by the Legislature of courts possessing criminal jurisdiction.

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The material portions of section 17 read as follows: "Justices of the peace and District Court justices may be elected in the different cities of this State in such manner, and with such powers and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, *shall be chosen by the electors of such cities or appointed by some local authorities thereof.*"

If, as is contended, the closing language of the section just quoted covers the establishment by the Legislature of inferior local courts of criminal jurisdiction, it is impossible to give force or effect to section 18. If it was the intention of the framers of the constitution to cover by section 17 the establishment of inferior local courts of civil and criminal jurisdiction, section 18 is surplusage.

The reading of these two sections together makes it apparent that the framers of the constitution were dealing in section 17, so far as cities are concerned, with courts of civil jurisdiction only. In construing these sections we have referred to the proceedings of the constitutional convention of 1868, in which sections 17 and 18 were amended, and, as amended, have been incorporated in the constitution of 1894, with a slight amendment not affecting any question herein involved.

Section 17 as it existed under the constitution of 1846 provided that "The electors of the several towns shall at their annual town meeting, and in such manner as the Legislature may direct, elect justices of the peace, whose terms of office shall be four years." The other provisions of this section related to the filling of vacancies and the removal of justices.

Section 18 provided that "All judicial officers of cities and villages, and such other judicial officers as may be created herein by law, shall be elected at such times and in such manner as the Legislature may direct."

It will be observed that section 17 related to the election

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of justices in towns, while section 18 related to judicial officers in cities and villages.

Under the amendment of 1868 section 18 was made general applying to all of the State, and was no longer limited to cities and villages, but provided that inferior local courts of civil and criminal jurisdiction may be established by the Legislature, and, except as herein otherwise provided for, shall be elected or appointed at such times and in such manner as the Legislature may direct.

Section 17 was then amended so as to extend to cities as well as towns by inserting the provision to which we have already referred.

It appears from the proceedings of the convention in 1868 that section 17 had been amended so as to provide that "Justices of the peace and *police justices* shall be elected in the different cities of this State in such manner, and with such powers and for such terms, respectively, as shall be prescribed by law" (Journal, p. 1093; Debates, p. 3732).

Subsequently, Mr. Murphy moved to reconsider the vote by which the article on judiciary was adopted, for the purpose of enabling him to move the substitute, as follows: "Justices of the peace and District Court justices shall be elected in the different cities of this State in such manner and with such powers and for such terms respectively as shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be elected or appointed by some local authorities of such cities respectively." This amendment was carried (Journal, pp. 1164, 1165).

In the debates upon this amendment, Mr. Murphy said: "It will be recollected that I proposed an amendment which was adopted, to this section, providing that justices of the peace and police justices shall be elected in the different cities of this State in such manner and with such powers and for such terms respectively as shall be prescribed by law. When I drew that amendment I supposed that justices of the Dis-

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trict Courts in the City of New York were really justices of the peace and were included within that denomination as expressed in the amendment; but it appears they are considered otherwise. I wish to amend that amendment by inserting after the words 'justices of the peace' the words 'and District Court justices.' I have submitted my amendment to the gentlemen interested in this question in the City of New York, and I believe all others who have taken any particular interest in this question, and with their assent I have modified the original amendment so as to read as follows:"

Mr. Verplank then stated: "I desire to know, as the section now stands, what becomes of police justices?" And, further, "I would like to ask the gentleman from Kings (Mr. Murphy) why he moves to strike out the election of police justices by the people of the cities where they reside?" To which Mr. Murphy answered: "In order to save the District Court justices in the City of New York, *which are entirely of civil jurisdiction.*"

Then Mr. Verplank further stated: "The police justices of the City of Buffalo have been elected for a great many years, and there never has been any complaint on the subject, and I know no reason why the election of these officers should be changed and made subject to appointment by the Legislature." To this Mr. Murphy replied: "It does not follow that it shall be." Mr. Comstock answered: "It will be left just where it is."

It is thus apparent that section 17 was framed for the purpose of providing for the election of justices of the peace in towns, and also for District Court judges or justices and other judicial officers in cities whose jurisdiction was limited to civil cases, leaving the organization of criminal courts to the provisions of section 18.

This is rendered clear beyond dispute from the proceedings of the convention just quoted, in which the provision for electing police justices was stricken out of section 17. It is true section 18 also provides for inferior local courts of civil

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jurisdiction as well as criminal, but this section having been made general so as to apply to the whole State, as well as to cities, inferior local courts may be established in villages or towns. It also covered existing conditions in other cities where courts had been established having both civil and criminal jurisdiction. By the provisions of this section judicial officers shall be elected or appointed at such times and in such manner as the Legislature may direct. Here we have no limitation upon the power of the Legislature. It may divide cities into districts and provide for the election of justices in such districts by the electors thereof, or may provide for their election by the municipality at large or by appointment.

The concluding provision of section 17, to the effect that all other judicial officers in cities whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities or appointed by some local authorities thereof, was evidently inserted to meet existing conditions in the City of New York and other cities of the State in which Superior City Courts and Courts of Common Pleas were in existence, having civil jurisdiction only. This provision was not intended to apply to courts having criminal jurisdiction only, as it would be in conflict with section 18, which provides that the judicial officers of such courts shall be elected or appointed at such times and in such manner as the Legislature may direct.

This construction is in accord with the case of *Curtin v. Barton* (139 N. Y. 505), which involved the constitutionality of chapter 342 of the Laws of 1892, establishing in the City of Syracuse a court called "The Municipal Court of the City of Syracuse." The contention was that this act was unconstitutional. It is unnecessary to consider the various provisions of the act in question. It is enough for our present purpose to call attention to the fact that the third section provides for the election of judges at the annual charter election to be held in the city next preceding the close of the

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term of the governor's appointees and thereafter as the term which was fixed at six years should expire. The next section provides for vacancies, and in the several sections following the powers and duties of the judges, and the several subjects to which the jurisdiction of the court was to extend, are specified and enumerated.

Judge O'Brien, writing the opinion of the court, said (at p. 509): "None of these provisions are material to the question involved in the appeal except the twelfth section, which provides that 'the said court shall have the same jurisdiction over the persons of defendants as is now possessed by Justices' Courts of towns, pursuant to the provisions of section 2869 of the Code of Civil Procedure, and for the purpose of conferring jurisdiction of the person the said City of Syracuse shall be deemed a town and the said court a Justice's Court thereof.' The most serious objection to this act grows out of the provision authorizing the governor to appoint the first judges. The court was so organized when the judgment under review was given, and it is claimed that the Legislature had no power to appoint or provide for the appointment of the judges. The solution of the question depends upon the construction to be given to section 19 and the last clause of section 18, article 6, of the constitution."

It should be observed that this opinion was written before the adoption of the constitution of 1894, and section 18, referred to in Judge O'Brien's opinion, is present section 17 and section 19 is present section 18 of article 6 of the constitution.

Judge O'Brien continues: "If the words 'all other judicial officers in cities,' contained in the last clause of section 18 (17), are applicable only to officers and courts existing when the constitution went into effect, and if it can be held that this court could have been legally constituted and the judges clothed with their official character under section 19 (18), then the Legislature clearly had the power to provide for the appointment of the judges by the governor and Senate. It

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may be difficult to construe these provisions in such a way as to give both full effect and in a manner as would exclude any doubt that the intention of the framers of the constitution had been ascertained and enforced. There is no doubt, however, in regard to the power of the Legislature to establish an inferior local court of civil and criminal jurisdiction in a city under section 19 (18) ; the only question here being as to the power to appoint the judges or confer this power on the governor. We do not deem it necessary to decide that question in this case."

The precise point, to which we call attention, is that it was held that there was no doubt in regard to the power of the Legislature to establish an inferior local court of civil and criminal jurisdiction in a city under section 19 (18), the only question for decision being the power to appoint judges and to confer that power upon the governor. This latter question was not decided.

It seems to have been taken for granted that present section 17 of the constitution related to existing courts, and that the Municipal Court of the City of Syracuse was organized under present section 18.

It is contended that all of the magistrates of criminal courts in a city must be either appointed or elected ; that the Legislature cannot provide for the election of a part and the appointment of the others. We find no authority for this contention in the constitution. On the other hand, it is in direct conflict with the provision of section 18 that judicial officers may be elected or appointed at such times and in such manner as the Legislature may direct. The Legislature in its wisdom may provide for both elective and appointive magistrates, as the exigencies of the case may demand. This power has frequently been exercised by the Legislature in the selecting of non-partisan boards in cities, as, for instance, in the City of Buffalo. Its revised charter of 1891 provides for a board of public works to consist of three members, who shall hold their offices for three years, one of whom shall be

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elected by the people and the other two appointed by the mayor, but the commissioners so appointed were not to be adherents of the same political party. The evident intention of the Legislature was that some skilled and experienced engineer should be kept upon the board, which could be better accomplished by the appointing power than by resorting to an election in which any person may be a candidate. The commissioners of public work are city officers, and they must be elected or appointed pursuant to the provisions of section 2 of article 10 of the constitution, the provisions of which are substantially the same as the concluding provisions of section 17 of article 6. We see no objection to non-partisan legislation of this character. In many respects it is more commendable than much of the legislation that is designed for partisan purposes; consequently we are of the opinion that the constitution does not deprive the Legislature of the power to provide for the election of certain city officers and the appointment of others.

It is argued that this construction would tend to deprive electors of their constitutional rights by permitting officers elected in a certain district to exercise their functions in another locality or portion of a city. We are of opinion that no such result follows. In the constitutions of 1846, 1868 and 1894 it is provided that justices of the Supreme Court elected in a certain district could exercise their functions in any county of the State. We have here the recognition, by the framers of the constitution, of the principle that an officer may be elected in one locality and exercise his functions in another.

A constitution is not supposed to deal with details, but general principles, and it is a familiar rule of construction that, where the letter of the constitution is in conflict with the intention of the Legislature, the latter will prevail.

It is clear that the framers of the constitution contemplated situations which might arise in the future when the Legislature should be free to provide for appointment or election

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in districts or cities at large, as might seem proper. The situation that confronted the Legislature when amending the charter of the City of New York in 1901 well illustrates the wisdom of the framers of the constitution in this respect. The City of New York, containing 3,500,000 of inhabitants, is made up of the entire counties of New York, Kings, Richmond and Queens and a portion of the County of Westchester. The boroughs of Manhattan and the Bronx constitute the First Division and the remaining territory the Second Division of the greater city. In dealing with the election of magistrates the Legislature saw fit to provide that they should be appointed by the mayor of the city in the First Division and elected by districts in the Second Division, with details to which reference need not now be made.

The situation presented in this enormous centre of population is not to be regulated by the policy that might prevail in a country village or town or a city of insignificant population. It cannot be properly said that the qualified electors in the boroughs of Manhattan and the Bronx are deprived of their constitutional rights by allowing the duly elected mayor to appoint magistrates in that division of the city. The mayor is placed in power by the electors and represents them in the act of appointment. On the other hand, there were many cogent reasons that rendered an election of magistrates in the Borough of Brooklyn, and ultimately in the other territory contained in the Second Division, desirable and proper.

One other point should be alluded to. Section 1392 of the city charter, as amended in 1901, provided as follows: "The city magistrates in office in the Second Division on the 1st day of January, 1901, who were police justices in the former City of Brooklyn in office on the 31st day of January, 1898, shall hold their office until their successors are elected at the general election to be held in the year 1901, but all city magistrates in the Borough of Brooklyn, appointed after January 31, 1899, who were in office on January 1, 1901, shall hold

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office until their successors are elected at the general election to be held in the year 1907."

The mayor having been advised that this extension of time was unconstitutional, appointed under compulsion of *mandamus* in June, 1901, six persons to the office of city magistrate, in the Borough of Brooklyn, to fill the vacancies caused by the expiration of the original terms of office of the former police justices of Brooklyn on April 30, 1901.

In the certificates of appointment, in obedience to the writ of *mandamus*, and in view of the situation, the terms of office of such new appointees were designated as expiring on December 31, 1901.

It is now claimed that the mayor, in making these appointments, was exercising his power under section 1392 as it stood prior to the amendment of 1901, and that the legal effect of his action was to vest in each of the appointees a term of ten years.

While we are of opinion that the extension of time contained in the amended section was constitutional, nevertheless, if the contrary is assumed, it is impossible, in view of the surrounding facts, to legally hold that the mayor was exercising his general powers of appointment. He was compelled to his action by the writ of *mandamus* and his certificates disclose upon their face the precise nature of the power that he exercised under the command of the court.

The cases cited to sustain the contrary view have no application to this situation, and if the statutory extension of time is to be deemed unconstitutional the appointments were absolutely void.

We have to say, in conclusion, that it seems to us a most unfortunate and unnecessary result that persons who have been neither elected nor appointed to the office of city magistrate should be declared entitled to this responsible position for a term of ten years by the judgment of this court.

The order appealed from should be reversed.

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PARKER, Ch. J.; GRAY and O'BRIEN, JJ., concur with WERNER and CULLEN, JJ.; BARTLETT and HAIGHT, JJ., dissent.

Ordered accordingly.

JENNIE AGNES DICKINSON v. WILLIAM M. HOES,
PUBLIC ADMINISTRATOR, AS ADMINISTRATOR
OF THE GOODS, CHATTELS AND CREDITS OF
JOHN KEALEY, DECEASED.

SUPREME COURT, COUNTY OF NEW YORK—MAY, 1902.

§ 2718.

Gift of Receipt. Donatio Causa Mortis.

A receipt for savings bank books is the subject of a valid donatio causa mortis, and passes title of the books and the moneys in the banks.

The sole distributee of an estate, with no debts existing against it, has a right to appropriate and transfer it by donatio causa mortis.

That there are no debts may be proved by common-law evidence, and publication for claims against the estate is not required.

The concurrence of a surety company, which is surety upon the distributee's bond as administrator before the discharge of the administrator, the donor, is not necessary, nor is the gift invalidated because the concurrence of the surety company was indispensable to the possession of the moneys on deposit.

(Decided May, 1902.)

Rose Kealey, a widow, died May 2, 1899, in this city, and was buried in Potter's Field by the city authorities. She left her surviving an only son, who had not been

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informed that his mother had \$2,500 on deposit in two savings banks in this city. Some days after her burial the son, John Kealey, found the savings bank books in an old hat box upon the top shelf of a closet, and thereupon he took out letters of administration upon his mother's estate, the United States Fidelity & Guarantee Company becoming surety upon his bond. The savings bank books were given to the surety company, who gave him a receipt for them, and he and the company executed an agreement under seal as to the deposit and payment of the money. The money was taken out of the savings banks and deposited with the Colonial Trust Company, upon which John Kealey was allowed to draw \$50 per month by his check countersigned by the surety company. He continued to occupy the rooms his mother and he had occupied in an old style tenement house, of which Mrs. Jennie Agnes Dickinson was janitress. Mrs. Dickinson's children had been accustomed to go to the grocery store and do other errands for old Mrs. Kealey, and Mrs. Dickinson often helped her and her son in many ways.

On the 9th day of April, 1900, John Kealey was found lying on the floor of his room moaning, and, Mrs. Dickinson having been called, he said to her that he was dying, and he asked her to bury him and take his mother out of the Potter's Field and bury her alongside of him. Upon Mrs. Dickinson declaring she had no money to do that, he said he had plenty, and told one of her daughters to go to a bureau drawer, to which he pointed, and get some papers. He handed the papers to Mrs. Dickinson, saying: "These papers are yours; you bury me and take my mother out of the Potter's Field and bury me alongside of her and all that is left over and all the money is yours." A plumber who was working in the house came into the room and suggested to Mr. Kealey that he ought to sign his name. Mr. Kealey asked for a pencil and the papers, took out the agreement he had signed and under his name and opposite the seal he made his mark, saying, as he handed the papers back to Mrs.

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Dickinson: "This is all I can do to-day." At 7 o'clock that night, on his way to the hospital, John Kealey died.

On the 19th day of April, 1900, the public administrator called upon Mrs. Dickinson and demanded the papers of John Kealey from her. She told him they were her property; the public administrator insisted and took the papers from her, giving her his receipt.

The Colonial Trust Company and the public administrator were then notified in writing that the moneys on deposit were her property and she demanded the same, which being refused, she brought an action in the Supreme Court to recover the moneys. The cause came on for trial and was decided against Mrs. Dickinson upon the ground that the moneys did not belong to John Kealey, so he could not dispose of them until administration upon his mother's estate had been completed and he had been discharged, as the surety company was liable upon his bond until then.

The public administrator was then appointed administrator of both Rose Kealey's and John Kealey's estate, and thereupon the money on deposit was paid over by the Colonial Trust Company to him. Mrs. Dickinson then served notice of claim, and demand of payment, and upon an offer to refer her claim under the statute, the present referee was appointed.

George F. Langbein, for the plaintiff.

Frank W. Arnold, for defendant, the public administrator.

HON. ROGER A. PRYOR, Referee.—Matter of Van Sloaten v. Dodge (145 N. Y. 327), not cited by counsel, occurs to the referee as possibly fatal to the validity of this proceeding. But in that case the gift was *inter vivos*, and, taking effect during the lifetime of the decedent, could not constitute a claim against him or his estate. But here is a gift *mortis causa*, which not being effectual until the death

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of the donor, is an apparent asset in the hands of his administrator, and is so claimed by him (*Williams v. Guile*, 117 N. Y. 343, 348; *Matter of Crosby*, 46 N. Y. St. Rep. 442, 444).

I conclude that the order of reference is not a nullity, and that I may proceed to determine the matter in controversy (Code Civ. Pro., sec. 2718).

John Kealey being sole distributee of his mother's estate, and no debts existing against it, he had a right to appropriate it without administration (*Blood v. Kane*, 130 N. Y. 554; *Matter of Mullon*, 145 N. Y. 104; *Barlow v. Myers*, 24 Hun, 286, 290; 15 L. R. A. 493, note).

It appears by a preponderance of proof that John Kealey meant to make the gift; that he was capable of forming such intention; that he made the gift in apprehension of death; that he died of the malady with which he was then afflicted; that he perfected the gift by due delivery, and that the donee accepted the gift. That the gift was perfected by the delivery of the receipt and agreement is an adjudged proposition (*Elam v. Keen & Leigh*, Va. 333).

The efficacy of the gift is not impaired by the fact that it was only of the residue of the fund, after payment for the burials (*Podmore v. Savings Institution*, 48 App. Div. 218; *Loucks v. Johnson*, 70 Hun, 565).

Nor is the gift invalidated because the concurrence of the surety company was indispensable to the possession of the fund (*Gilkinson v. Third Ave. R. R.* 47 App. Div. 472; *Page v. Lewis* 18 L. R. A. 170, 180).

The conclusion is that the judgment must be for the plaintiff.

[There was no appeal from the decision of the referee.]

ASCERTAINMENT OF DEBTS.

Section 2718 of the Code of Civil Procedure was amended in 1893, so that it, with 2717, became 2722 of the present Code, and section 2718, as it now stands, is new to the Code.

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See also R. S. 2561-2. Sections 34, 35, 36, 37, 39. L. 1859, ch. 261. L. 1880, ch. 245. L. 1890, ch. 456.

COSTS. See note, 24 Civ. Pro. 289, 290, and 28 Civ. Pro. 161, 163.

DISBURSEMENTS. Allowed. See same case and note.

REFERENCE. This section (2718) now provides that on the entry of an order of reference of a claim against a decedent's estate the proceedings shall become an action in the Supreme Court, and that the reference shall be governed on the question of costs by sections 1835 and 1836 of the Code. This does not change the existing rule that disbursements may be allowed, even though no reference is made to them in these sections. *Outhouse v. Odell*, 24 Civ. Pro. 289.

UNREASONABLY RESISTED. Where, however, the claim has not been unreasonably resisted or neglected by the defendants, disbursements are allowed, but costs may not be, the plaintiff being entitled, in such case, to the referee's and witnesses' fees and other necessary disbursements. *Mulligan v. Cannon*, 25 Civ. Pro. 348. *Matter of Raab*, 47 App. Div. 33.

WHEN COSTS SHALL BE ALLOWED.

Where there is a recovery on a claim which has been rejected by the executor who has failed to file the consent required, costs must be allowed. *Carter v. Barnum*, 28 Civ. Pro. 161.

STATUS OF CLAIMS.

A judgment recovered against the decedent during his lifetime is not a claim which may be rejected and referred within the contemplation of sections 1822 and 2718 of the Code of Civil Procedure. It is a debt, the validity of which has been established by a court of competent jurisdiction. Section 2743, 72, N. Y. 518. The court has simply to determine to whom it is payable. *Matter of Browne*, 35 Misc. 362.

LIFE ESTATE under a will is not such a claim as may be referred under section 2718, nor within its contemplation. *Matter of Weeden*, 37 Misc. 716.

PROOF OF CLAIM.

The requirements as to proof of claim is to prevent imposition upon estates and confers no jurisdiction, nor does it prove the existence of the debt, and is not evidence for this purpose. *Osborne v. Parker*, 66 App. Div. 277.

The presentation of the claim in compliance with the statute and imposes the duty upon the executor to affirmatively establish the defense. *Matter of Rowell*, 45 App. Div. 323.

See also cited in above opinion Red. Surr. 5th Ed. 527. *Lerche v. Brasher* as adm., 104 N. Y. 157; *Hicks-Alixanian v. Walton exr.*, 14 App. Div. 199.

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HARRY GRIFFITHS, AN INFANT, BY HENRY W. GRIFFITHS, GUARDIAN AD LITEM, RESPONDENT, v. METROPOLITAN STREET RAILWAY COMPANY, APPELLANT.

COURT OF APPEALS—MAY, 1902.

§ 834

Testimony of Physician. Construction of Section 834, Code Civil Procedure.

To bring the evidence of a physician within the prohibition of section 834 of the Code, three elements must coincide: 1. The relation of physician and patient must exist. 2. The information must be acquired while attending the patient. 3. The information must be necessary to enable the physician to act in that capacity.

The burden of showing that evidence sought to be excluded is within the prohibition of the section rests upon the party seeking to exclude it.

Defendant's witness, a physician, was at the scene of an accident when the ambulance arrived and rendered first aid to the plaintiff, who was seriously injured. He rode with plaintiff in the ambulance part of the way to the hospital, at which he was an attending physician; but had no other relations with the plaintiff until ten days thereafter, when he called upon plaintiff at the instance of the defendant and had a conversation with him about the details of the accident. This, he testified, was distinct from any treatment as a physician. The witness' evidence of this conversation was, under objection by plaintiff's counsel, excluded. *Held* error.

(*Decided May, 1902.*)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department reversing

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a judgment dismissing the complaint and reinstating a verdict rendered by a jury.

On the 17th day of April, 1899, the plaintiff, a boy between 7 and 8 years of age, was struck by one of the defendant's northbound cable cars on Columbus avenue, between Ninety-third and Ninety-fourth streets, in the City of New York. This action is brought to recover damages for the injuries he thus received. The accident occurred between 5 and 6 o'clock in the afternoon. The day was clear and bright. The plaintiff lived with his parents at the northwest corner of Columbus avenue and Ninety-third street. Just before the accident he had been sent by his mother on some errands. Having made some purchases at a store on the west side of the avenue, just below Ninety-fourth street, he started to cross the street directly in front of the store. He stood at the curb watching some men at a manhole for a short time, and then proceeded into the street as far as the easterly or "uptown" track of the defendant's road, where he waited for an up car to pass. Then he looked north and south and stepped upon the "up track." While upon the track, and, as he says, waiting for two southbound cars to pass, he was struck by an up-bound car. As a result of this collision one of his arms was fractured and one of his legs was so badly crushed that it had to be amputated just above the ankle.

There was a sharp conflict in the evidence as to the distance between the car and the plaintiff when he stepped upon the track. The plaintiff testified that when he attempted to cross the track there was no up-bound car in sight as far south as the corner of Ninety-third street, which was about 150 feet distant; that he did not see it until it was two or three houses from him; that he then attempted to get off the track, but the car was coming so fast he could not get out of the way in time to avoid the accident. Other witnesses corroborated the plaintiff's story. There was some

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evidence upon which the jury had the right to find that the car could have been stopped in time to have avoided the accident, although it was going at full speed, and there was conflicting evidence as to whether the warning gong was sounded or not. The plaintiff was a bright, intelligent boy, who, according to his mother's testimony, was capable of taking care of himself upon the street.

No motion to dismiss the complaint or for a non-suit seems to have been made at the close of plaintiff's testimony. After all the evidence was in, counsel for the defendant moved "to dismiss the complaint upon the ground that the plaintiff has not shown by a preponderance of proof that he was free from contributory negligence and that the accident was caused solely by the negligence of the defendant." The trial court reserved decision upon this motion pending the submission to the jury of certain specific questions in accordance with the practice authorized by section 1187 of the Code of Civil Procedure.

The answers which the jury returned to these questions disclose that they found that the gripman of the car saw the plaintiff in time to have avoided the accident; that the defendant was guilty of negligence which caused the injury, and that neither the plaintiff nor his parents were guilty of contributory negligence. Plaintiff's damages were fixed at \$5,000. After the jury had rendered this verdict the defendant renewed the motion to dismiss and also moved for a new trial. No exception was taken by the defendant to the action of the trial court in submitting to the jury the questions whether the plaintiff was free from contributory negligence and whether the defendant was negligent. The trial court subsequently set aside the verdict and dismissed the complaint, without granting a new trial. The plaintiff then appealed to the Appellate Division from the judgment entered upon the order of the trial court setting aside the verdict and dismissing the complaint. The Appellate Divi-

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sion reversed the order dismissing the complaint and reinstated the verdict, also without ordering a new trial.

David B. Hill, for appellant.

Ferdinand E. M. Bullowa, for respondent.

WERNER, J.—The form of defendant's motion to dismiss the complaint seems to concede that there was some evidence of defendant's negligence as well as plaintiff's freedom from contributory negligence. The motion was based upon plaintiff's alleged failure to establish by "preponderance of proof that he was free from contributory negligence and that the accident was caused solely by the negligence of the defendant." However that may be, the facts involved in the inquiry have been disposed of by the learned Appellate Division in favor of the plaintiff, and this court is bound by that decision. The only question presented by the record which is open for our consideration arises upon an exception taken to a ruling of the learned trial court in excluding certain evidence of a physician called as a witness for the defendant. The evidence was excluded because it was thought to be within the prohibition of section 834 of the Code of Civil Procedure, which provides: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." One, Dr. Moorehead, called as a witness for the defendant, testified that he was at the scene of the accident when the ambulance arrived, but, aside from the fact that he rendered first aid to the plaintiff in the drug store immediately after the accident, he had no relation with him. The record discloses that Dr. Moorehead was an attending physician at the J. Hood Wright Memorial Hospital, where the boy was taken, and had ridden with the boy in the ambulance about three blocks of the way to the

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hospital; that he was also a surgeon in the employ of the defendant, but whether such employment commenced before or after the accident is not disclosed; that he next saw the boy about ten days afterwards at the hospital, when he had a talk with him, as he says, as part of his duty toward the defendant. He was then asked by counsel for the defendant: "Can you state whether or not, from his conversation, he was suffering any pain, or whether he talked to you and understood you?" The court here interposed and said: "We will settle the question of the admissibility of his evidence." The witness was then permitted to continue, saying: "I then asked him to tell me the details of his accident, and I received some reply from him." At this point a discussion ensued between counsel and court, at the conclusion of which the court, after expressing doubt as to the admissibility of the testimony, said: "I will give you an exception," although up to that time no objection appears upon the record. The witness then stated: "I did not in the hospital at this time ten days afterwards go to treat him in any sense as a physician." The doctor was then interrogated by counsel for the defendant as follows: "Q. Did you have any talk with him as to that condition, or only as to the way in which the accident happened?" "A. It was entirely as to the method of the accident." "Q. So that whatever he said to you was entirely distinct from any treatment or visit of a physician or anything of that sort?" "A. Entirely so." The counsel for the defendant here said: "I now renew the question." Whereupon the court further interrogated the witness, eliciting from him, in substance, that he did not think that the plaintiff knew that he was the physician who treated him at the drug store, and that he did not advise him of the fact until after the plaintiff had given him a statement. This ended the examination of the witness, and the court said: "It is rather a narrow question. But I think the doctor came there with the assumed authority that a doctor would have in such a place and that any talk that he had with the

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boy was privileged." To this the counsel for the defendant excepted. It is to be observed that there is no exception which sharply points to the evidence excluded by the court, but, we think, there is enough in the record to indicate that the court ruled out all evidence of the witness as to any conversation he had with the plaintiff concerning the details of the accident and how it occurred. To bring the evidence of a physician within the prohibition of the Code section above quoted, three elements must coincide: 1. The relation of physician and patient must exist. 2. The information must be acquired while attending the patient. 3. The information must be necessary to enable the physician to act in that capacity. Upon the evidence disclosed by the record, it is doubtful whether either of these requisites were established in the case at bar. It is true that Dr. Moorehead did render first aid to the plaintiff and rode with him in the ambulance for a distance of three blocks. But the physician testified that thereafter he had no relation to the plaintiff, either as an official of the hospital or otherwise, until about ten days after the accident, when, as a part of his duty to the defendant, he saw the plaintiff at the hospital. There is nothing in the record to disclose the nature and purpose of this visit except the doctor's statement that it was made as part of his duty to the defendant, by whom he was then employed, and that the doctor did not go to the hospital to treat the plaintiff "in any sense as a physician."

It is the well-settled rule that the burden of showing that evidence sought to be excluded under this section is within the prohibition of the statute rests upon the party seeking to exclude it (*People v. Koerner*, 154 N. Y. 355; *Fisher v. Fisher*, 129 N. Y. 654; *People v. Schuyler*, 106 N. Y. 298; *Edington v. Ætna Life Ins. Co.*, 77 N. Y. 564). In *People v. Koerner* (*supra*) we find the latest expression of the rule in this court, where it is laid down by Judge Martin, as follows: "Where the testimony of the physician is sought to be excluded under the provisions of that section (834) of the

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Code, the burden is upon the party seeking to exclude it to bring the case within its provisions. He must make it appear not only that the information which he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act." Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion that the conversation which the doctor was about to give had any relation to professional treatment. There may be circumstances in which it is necessary for a physician to inquire of a patient how an accident happened in order to properly treat him. But that is not true in all cases, and no such necessity was shown in the case at bar. In *People v. Schuyler* (*supra*) a jail physician was called to state his opinion as to the sanity of the defendant, and, notwithstanding the fact that the witness had examined the defendant in his professional capacity, he was allowed to testify, and this court sustained the ruling. In *Edington v. Ætna Life Ins. Co.* (*supra*) the physician had treated the assured professionally, but the relation had ceased some time before the death of the assured. He was asked if the assured was cured when he left the witness' hands, and what, generally, was his physical condition. These questions were excluded, and this court decided that the ruling was erroneous. In the case at bar the witness expressly stated that the information which he obtained from the plaintiff was distinct from any treatment as a physician, and that the conversation was simply as to the details of the accident. No fact was brought out tending in any way to contradict him. If it had appeared that the information was at all necessary to enable the witness to treat the plaintiff professionally, the trial judge would have been justified in excluding the evidence. Where the party seeking to exclude the evidence shows facts which indicate that the information was necessary for professional treat-

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ment, the trial judge is the sole judge of its admissibility, notwithstanding the physician's statement to the contrary (*Bacon v. Frisbie*, 80 N. Y. 399). The decision of the question of fact which arises under such circumstances rests in the discretion of the trial judge, subject to review by the Appellate Division. Where, however, there is nothing to show that it was necessary for this purpose, it does not fall within the condemnation of the statute. The information sought need not be confidential in its nature (*Renihan v. Dennin*, 103 N. Y. 573), but it must appear in some way that it was necessary to enable the physician to act in his professional capacity. It is true that in *Feeney v. L. I. R.R.* (116 N. Y. 375, 380) Judge Vann quotes with approval the language of the opinion in *Edington v. Mut. L. Ins. Co.* (67 N. Y. 185, 194) to the effect that where a physician has attended a patient professionally, and is called to testify as to information secured from the patient, "it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient." But what was said in the *Feeney* case was proper in both cases in view of the facts there presented. In the *Feeney* case the plaintiff had consulted the physician in his professional capacity the day after she was hurt. The physician was asked whether he had conversed with her about her injuries, and whether he made an examination of her at that time. Both questions were held to have been properly ruled out. In that case every element necessary to bring the questions within the prohibition of the statute was present. The relation of physician and patient was established, the witness was attending in his professional capacity, and the information which he obtained from the patient was plainly necessary to enable the witness to act in that behalf. In the *Edington* case the information given to the physicians was plainly necessary to enable them to act in their professional capacity. In *Renihan v. Dennin* (103 N. Y. 573) Judge

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Earl said: "It is not disputed, and could not well be, that the information obtained by the witness was necessary to enable him to act in his professional capacity." In *Grattan v. Met. Life Ins. Co.* (80 N. Y. 281, 296) the questions excluded were plainly within the prohibition of the statute, and the court was careful to limit the rule there laid down to the particular circumstances of that case.

We think the plaintiff in the case at bar did not successfully sustain the burden of showing that the evidence excluded was within the prohibition of the statute. In arriving at this conclusion we are not laying down a general rule. The statute states the general rule and we simply decide that the peculiar facts of this particular case do not come within its operation.

The judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch.J.; BARTLETT, HAIGHT, MARTIN and CULLEN, JJ., concur; VANN, J., not voting.

Judgment reversed, &c.

In re Application of Caroline Smith v. Lawrence P. Mingey.

IN THE MATTER OF THE APPLICATION OF CAROLINE SMITH, AS GENERAL GUARDIAN OF ELIZABETH ROESSNER, RESPONDENT, v. LAWRENCE P. MINGEY, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—MAY, 1902.

§ 755.

Accounting by Guardian Ad Litem. Death of General Guardian Who Instituted Proceeding—Continuance in Name of Real Party in Interest—Failure to File Exceptions to Referee's Report.

In a proceeding instituted by the general guardian of an infant to compel an accounting by a guardian ad litem, where the general guardian died and the infant became of age after the hearing of the motion, but before the making of an order of reference to take and state the guardian's accounts. Held that the right to an accounting was not thereby destroyed, and the proceeding did not abate.

After the death of the general guardian and the ward had attained her majority, all that was necessary was a suggestion of these facts upon the record and that the proceeding be continued thereafter in the name of the real party in interest.

The order confirming the referee's report was entitled "In the matter of the application of E. J., formerly E. R." Held that, under the circumstances, the change of title was all that was necessary; that such change at most was a mere matter of form, and that the appellant was not prejudiced in any way by such method of proceeding.

An order confirming the referee's report, so entitled, effectively binds the former infant and protects the appellant.

Failure to file exceptions to the report of the referee until after the time provided by rule 30 of the General Rules of Practice expired, made the referee's report final as far as the appellant

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was concerned, he not presenting a sufficient excuse for such failure to justify the granting of an application for additional time.

Van Brunt, P.J., dissents.

(Decided May, 1902.)

Appeal from two orders, one directing a guardian *ad litem* to pay over certain moneys, and one denying an application to file exceptions to a referee's report.

George H. Balkam, for appellant.

Lawrence E. Brown, for respondent.

McLAUGHLIN, J.—On the 25th of May, 1899, Caroline Smith was appointed the general guardian of Elizabeth Roessner, an infant, and in October following she instituted this proceeding to compel the defendant to pay to her certain moneys which he had collected for her ward. The papers upon which the order requiring the appellant to show cause why he should not pay over such moneys was made showed that at that time the ward had become 21 years of age. The appellant, in response to the order to show cause, filed an account of his proceedings, which the court instead of passing upon (certain objections having been made to some of the items), sent to a referee, with directions to take and state the same and make a report thereof. After several hearings had been had before the referee, the appellant objected to the continuance of the proceeding upon the ground that the general guardian was dead and that her ward was then over 21 years of age. The objection was overruled and an exception taken. The objection was properly overruled, because at the time the same was made there was no proof before the referee establishing the death of the general guardian or that her ward was over 21 years of age, other than set forth in the papers upon which the original order was based. At a subsequent hearing, however, it did appear

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that the general guardian was dead (she having died on the 19th of December, 1899), and that her ward was, at the time the order of reference was made, over 21 years of age. But these facts did not destroy the right to an accounting, nor did the proceeding instituted for that purpose abate by reason thereof (sec. 755 of the Code of Civ. Pro.). After the death of the general guardian and the ward had attained her majority, all that was necessary was a suggestion of these facts upon the record, and that the proceeding thereafter be continued in the name of the real party in interest (*Breese v. Met. Life Ins. Co.*, 37 App. Div. 152). The appellant, however, seems to have been content with continuing the proceeding without objection, notwithstanding such suggestion was not then made upon the record. Several hearings were thereafter had, and he did not object in any way to what was done, nor does the record disclose a single objection in this respect until after the hearing had been closed, when he contented himself with moving to dismiss the proceeding upon the ground, among others, that "the referee acts and continues this proceeding without jurisdiction and without power," and there is no exception to the denial of the motion, as indicated by the final report of the referee. The referee, in his report, called the court's attention to the fact that the general guardian had died, and that her ward had attained the age of 21 years, and the court thereupon, in the order made confirming the referee's report, entitled it: "In the matter of the application of Elizabeth Johnson, formerly Elizabeth Roessner." This, we think, under the circumstances, is all that was necessary. The change in title, at most, was a mere matter of form (*Mapes v. Snyder*, 59 N. Y. 450). The appellant was not prejudiced in any way by this method of procedure. Had he desired to have the proceeding continued in the name of the real party in interest, as soon as it appeared that the general guardian was dead he could have taken the necessary proceedings for that purpose. This, however, he did not see

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fit to do. The order as made binds the former infant and protects the appellant just as effectively as it would had the same been made prior to the first hearing before the referee (Signa Iron Co. v. Brown, 58 App. Div. 436). It is also suggested that the order should be reversed because the proceeding was instituted against the appellant as an attorney. It is true he is so described in the title of the action, but all of the papers and proceedings indicate that he was asked to render an account, not as an attorney, but as a guardian *ad litem*. But if there were any force in the suggestion it would not be available to the appellant, he never having objected to the proceeding upon that ground, and therefore must be deemed to have waived it.

Upon the merits we are satisfied that the referee reached the correct conclusion and that his report was properly affirmed, and in this connection it appears that the appellant did not file any exceptions to the report of the referee until after the time provided by rule 30 of the General Rules of Practice had expired, for which reason the report became final so far as he was concerned (Matter of Talmage, 39 App. Div. 466). Nor did the court err in denying his application to permit him to thereafter file exceptions. The excuse which he gave for his failure to file the exceptions within the time required was insufficient to justify the court in granting his application.

It follows, therefore, that the orders appealed from must be affirmed, with \$10 costs and disbursements.

PATTERSON and O'BRIEN, JJ., concur; LAUGHLIN, J., concurs in result.

VAN BRUNT, P.J.—(dissenting)—I dissent from the conclusion arrived at by the majority of the court. In the opinion it is stated as follows: "After several hearings had been had before the referee, the appellant objected to the continuance of the proceeding upon the ground that the general guardian was dead and that her ward was then over

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21 years of age. The objection was overruled and an exception taken. The objection was properly overruled, because at the time the same was made there was no proof before the referee establishing the death of the general guardian or that her ward was over 21 years of age, other than that set forth in the papers upon which the original order was based. At a subsequent hearing, however, it did appear that the general guardian was dead (she having died on the 19th day of December, 1899) and that the ward at the time the order of reference was made was over 21 years of age. But these facts did not destroy the right to an accounting, nor did the proceeding instituted for that purpose abate by reason thereof (sec. 755 of the Code of Civil Procedure). After the death of the general guardian and the ward had attained her majority, all that was necessary was a suggestion of these facts upon the record and that the proceeding thereafter be continued in the name of the real party in interest (*Breese v. Metropolitan Life Ins. Co.*, 37 App. Div. 152). The appellant, however, seems to have been content with continuing the proceeding without objection, notwithstanding such suggestion was not then made upon the record. Several hearings were thereafter had and he did not object in any way to what was done, nor does the record disclose a single objection in this respect until after the hearing had been closed, when he contented himself with moving to dismiss the proceeding, &c."

It seems that the appellant, instead of in any way sleeping upon his rights, called the attention of the court at the earliest possible moment to the fact that there was no moving party before it, the initiator of the proceeding being dead. It is said that there was no proof of the fact before the referee when the objection was raised at the second hearing—not as stated in the opinion after several hearings; there had been but one. The appellant was not called upon to offer proof of the fact of the death of the moving party. The fact existed and the counsel for the dead petitioner went

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ahead at his peril. Would it be claimed for a moment that if a counsel went to trial with the plaintiff, his client dead, and took a judgment, that it would be of the slightest value? I think not. It is clearly the duty of the counsel for a party seeking relief either by action or special proceeding to see that he has a client in court and not in the grave. It seems to me that it is an anomaly to hold that a defendant can be pursued by a dead plaintiff, unless he proves that the plaintiff is dead, and offers such proof at the earliest possible moment.

It is urged that all that was necessary was a suggestion upon the record. But the suggestion was necessary, and, not being made, there was no one before the court. We are further told that the appellant seems to have been content with continuing the proceeding without objection, notwithstanding such suggestion was not then made upon the record. As he objected at every opportunity he had, I cannot see how it can be said that he proceeded without objection. This is the first time, I think, that it has ever been held that it was the duty of the defendant to revive a proceeding or action.

I am further of the opinion that the court has no jurisdiction to proceed in this summary way. It is true that the appellant was an attorney, but he is not being proceeded against because of any conduct as an attorney.

ABATEMENT AND CONTINUANCE OF ACTIONS AND SPECIAL PROCEEDINGS.

The provisions of the Code directing a continuance of an action by or against the representative of a party to an action who died since the commencement of the action do not include a case where all the parties to the action are dead at the time of the motion and by the common law the action abated. *Holsman v. St. John*, 2 Civ. Pro. 48.

An action may also be continued in the name of the original plaintiff, he being the trustee of an express trust for the benefit of an indorser and payee who paid after commencement of suit. *Concord Granite Co. v. French*, 3 Civ. Pro. 56.

The death of an executor does not bar the continuance against such executor of an action on said claim begun against his descendent

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before his death. *Dalton v. Sandland*, 4 Civ. Pro. 73; see also note to this case, p. 75.

Where a counter-claim is interposed in the original action and the plaintiff dies, a motion to continue should be granted and the counter-claim allowed to be used as a set-off. *Dock v. South Brooklyn Saw M. Co.*, 6 Civ. Pro. 144.

WHEN ACTION FOR PENALTIES SURVIVES AND MAY BE REVIVED.

An action to enforce the personal liability of a trustee of a corporation for its debts for failure to file annual report and for making a false report does not abate on the death of the plaintiff, but may be revived and continued by his personal representation. The debt is assignable, and an assignee of the debt takes, as an incident thereof, the right to the penalty. An administrator or executor is deemed in law to be the assignee of the assets of the estate which he represents. *Bonnell v. Griswold*, 8 Civ. Pro. 280; see also *Pierson v. Morgan*, 17 Civ. Pro. 124.

An action of ejectment may be revived and continued after verdict when the party dies before. *Doherty v. Matsell*, 2 Civ. Pro. 103.

An action may also be revived to permit an executor to contest liability for costs, although cause of action has abated. *Campbell v. Gallagher*, 18 Civ. Pro. 90.

Also for purposes of appeal, even although the cause of action has abated. *Campbell v. Gallagher*, 18 Civ. Pro. 90; *Miller v. Gunn*, 7 How. Pr. 159; *Wood v. Phillips*, 11 Abb. Pr. N. S. 1; *Comstock v. Dodge*, 43 How. Pr. 47; *Atlantic Dock Co. v. Mayor*, 53 N. Y. 64.

An action for damages against a corporation abates upon the dissolution of such a corporation, unless there is a statute to the contrary. *Grafton v. Union Ferry Co.*, 20 Civ. Pro. 238.

See also same case on appeal in 22 Civ. Pro. 402, and note to same on page 407. But see *People v. Troy Steel & Iron Co.*, 24 Civ. Pro. 201.

SURROGATE'S COURT.

Prior to 1891 there was no authority for continuing a pending undetermined special proceedings in the name of administrator or executor.

The right to revive such proceedings in the name of or against executors or administrators of deceased parties depends upon statutory authority. Section 755 does not relate to proceedings in Surrogate's Courts. *Matter of William C. Camp*, 24 Civ. Pro. 159.

PLEADINGS.

May be amended to properly accomplish the result with the scope of section 755. *Griswold v. Bien*, 25 Civ. Pro. 122.

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PARTITION.

The death of a sole party does not abate an action in partition. *Cheney v. Rankin*, 29 Civ. Pro. 285.

LACHES.

May defeat a right to revive. *Lyon v. Park*, 16 Civ. Pro. 109.

ON A MOTION TO REVIVE WHAT NOT CONSIDERED.

The subject matter of the defense in an action will not be considered upon a motion to revive it after the death of the sole plaintiff.

Failure to pay motion costs does not operate as a stay nor an answer to this motion. *Clute v. Emerich*, 16 Civ. Pro. 123.

An action does not abate and may be continued in the name of an assignee or an administrator of a deceased plaintiff. *McNulta v. Huntington*, 62 App. Div. 257.

**ALPHONSE H. ALKER ET AL., RESPONDENTS, v.
BENJAMIN T. RHOADS, JR., ETC., APPELLANT.**

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—MAY, 1902.

§ 723.

"Lloyds" Insurance—Reinsurance—Amendment—Limitations.

In an action upon a policy issued by a "Lloyds" association, the attorney in fact of the association was originally named as an individual. Subsequently, upon notice, an amendment was allowed and a supplemental summons authorized, describing him in his representative capacity as attorney in fact for the individuals composing the association. Held that such an amendment was within the power of the court under section 723 of the Code, it being competent for the court to correct by amendment a misdescription of the defendant or a mistake in the name. Held also that even if the substantial result of the amendment was to terminate the first action and to begin a new action, the defendant could not set up the one year limitation of time to bring an action contained in the policy in question, because the policy was one of reinsurance, to which such limitation would

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not apply, the rule being, as laid down in *Jackson v. St. Paul Ins. Co.* (99 N. Y. 124), that the six years statute applies to reinsurance contracts.

The action being in fact between two "Lloyds" associations, and the contract of reinsurance having stipulated that in determining the plaintiff's "net premiums" within a given period, there should be deducted from the gross premiums the "commissions paid" during the period, Held that it was proper to deduct the entire compensation allowed to the attorneys in fact of the plaintiffs as being fairly within the term "commissions."

The contract of reinsurance contained a clause which was obviously an imperfect expression of the intention of the parties. Upon presenting their original proof of loss, the plaintiffs stated fully their understanding of the clause, which agreed with the defendants' position, and made the proof accordingly. Subsequently, without explanation, they served an amended proof of loss for an increased amount ignoring their previous action; Held that the clause in question was meaningless unless it signified what the defendants claimed; that a definite practical construction had been given to it by the parties which should control; and that the judgment should be modified accordingly. (*Decided May, 1902.*)

Appeal from judgment entered after trial at Trial Term, a jury having been waived.

This action was brought by the plaintiffs, who compose the association known as New York and Boston Lloyds, to recover upon a policy of reinsurance executed by the defendant, who is attorney in fact of the association known as People's Fire Lloyds, on September 15, 1895, whereby it was agreed to indemnify the plaintiffs from the date of the policy to January 1, 1896, against any loss they might sustain on certain policies issued by them in excess of 50 per cent. of the net premiums received by them during the term of such policy to an amount not exceeding \$5,000. The policy of reinsurance provided that such net premiums were to be determined by deducting from the gross premiums "commissions paid," return premiums upon policies canceled and premiums upon reinsurance, and that "the underwriters hereon" should "make good to the underwriters at New York and Boston Lloyds their

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proportion of such excess loss," * * *. Then follow the words "\$15,000 September 15, 1895, to January 1, 1896, without the right of cancellation by either party."

Losses having occurred within the period, the plaintiffs gave notice thereof on January 3, 1896, and presented proof on February 11, 1896, that the amount of excess losses over 50 per cent. of net premiums was \$10,578.94, stating: "There being an implied agreement to carry a total insurance concurrent with your form of policy of \$15,000, the adjustment is to be made as though such \$15,000 insurance were in force. Your proportion of such excess of loss, therefore, is one-third, or \$3,526.31." Subsequently, on April 13, 1896, plaintiffs presented a proof of loss showing excess of losses over 50 per cent. of net premiums to be \$10,695.57, with \$10,000 insurance in force, of which the maximum of the People's Fire Lloyds was \$5,000; wherefore \$5,000 was demanded. Such demand being refused, this action was brought to recover the same by service of summons and complaint on the defendant individually on November 13, 1896, and the supplemental amended summons and complaint were served on him as representing the People's Fire Lloyds on February 10, 1899.

The court found in favor of the plaintiffs for the full amount demanded and from judgment so entered the defendant appeals.

G. H. Crawford and *Wm. P. Burr*, for appellant.

Wm. B. Ellison and *Arnold L. Davis*, for respondents.

O'BRIEN, J.—Three objections are urged against the validity of the judgment, the first being that the court never obtained jurisdiction of the defendant. This objection arose out of the fact that Benjamin T. Rhoads, Jr., was originally sued as an individual, but the plaintiffs having, under decisions, ascertained the fact to be that an action must in the first instance be against the manager and attorney in fact and not

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against the underwriters individually, moved to amend the summons and complaint at Special Term, which was granted; and the question presented is whether, under section 723 of the Code of Civil Procedure, the court had power to so amend the complaint.

The decisions upon the extent to which the court's power may be exercised in granting such amendments are not uniform and cannot be in all respects reconciled. That such power is not unlimited we know; and the case of *N. Y. Milkpan Association v. Remington Works* (89 N. Y. 22) is one relied upon by the appellants as against the amendment here allowed. There the action was commenced against a corporation as sole defendant, and the amendment sought was the insertion of the names of other persons individually as defendants. It was held therein that the effect of such an amendment was to continue the action against other and different parties from these named, thus substituting a cause of action against other and different defendants. In the opinion rendered at the General Term (25 Hun, 475), in that case we find all the authorities collated and discussed in which the question of the right of amendment has been presented. One of the cases cited is that of *Tighe v. Pope* (16 Hun, 180), where an action was brought against the defendant describing her as administratrix and asking judgment against her as such, and where the motion was to strike out the words "as administratrix," and the court held that it should be granted, remarking that whether the amendment was allowed or not, the same person would be defendant.

That case upon its facts is clearly distinguishable; recognizes, as do the other cases, the power with its limitations, which, we think, permits the court to grant an amendment in the description or designation of the person who is sued; and that although an entirely new and different person cannot be substituted, it is competent for the court, where there has been either a misdescription of the person or a mistake in the name, to permit the amendment.

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Applying that rule, therefore, to the case at bar, we think the court has undoubted power to grant this amendment, and the only benefit that the defendant could reap, if any, would be in the contention that the first action ended and by the amendment it would be the commencement of a new action as a defense to which the defendant might interpose the bar of the Statute of Limitations. Were this contention sustained the defendant, we think, is in error in supposing that he would derive benefit therefrom. It may be conceded for the sake of argument that the amendment brought in an entirely new and different party and that this would be controlling as to the time when the action was commenced and the Statute of Limitations began to run. The appellant's position is that the one-year Statute of Limitations provided in the policy of insurance applies, which requires the action to be brought within one year after the fire took place. Were the short Statute of Limitations to apply here, there would be some foundation for the argument to rest upon. We think, however, it does not apply. Although the policy in form is the ordinary one issued by a company to insure against loss by fire, containing provisions as to time for filing proofs of loss, etc., it is conceded that this was not the ordinary policy insuring against loss by fire, but was a policy of *reinsurance*, and that the substantial part of the agreement was in the "rider" attached to the form of policy. It is to be construed, therefore, as the parties intended it should be, as a policy of reinsurance, and to a claim thereunder the one year provision would not apply. In the case of *Jackson v. St. Paul Ins. Co.* (99 N. Y. 124) the six-year Statute of Limitations was held to apply to reinsurance contracts, and not the clause in the policy limiting the right to commence an action upon the policy within the next twelve months after the fire.

The second question is whether the right principle was applied in determining "net premiums" under the contract, which involves the question whether the plaintiffs were justified in deducting the entire compensation allowed to their at-

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torneys in fact, instead, as the plaintiffs insist, of limiting it in the words of the policy to "commissions paid" for business procured. To limit the words "commissions paid" merely to those paid to outside agents would be too narrow a construction. In our view, therefore, it was not improper in determining the "net premiums" to deduct the compensation allowed to the attorneys under their agency contract, thinking, as we do, that such payment was "commissions paid."

The third question is whether or not the plaintiffs are co-insurers with the defendant on this risk by reason of an alleged agreement to maintain \$15,000 insurance on it. This question arises upon the provision of the rider in the policy, which is in the following language: "\$15,000, September 15, 1895, to January 1, 1896, without the right of cancellation by either party hereto." Unless we hold that there was no object intended in inserting that clause, or unless it is meaningless, the construction given to it by the defendant should prevail. In construing a contract, however, it must be assumed that the parties meant something by the language employed, and that there was some purpose to be effectuated by it. It is significant in this connection that upon the presentation of the first proof of loss which was prepared by the person who formulated the rider in which this provision appeared we find this statement: "There being an implied agreement to carry a total insurance concurrent with your form of policy of \$15,000 the adjustment is to be made as though such \$15,000 insurance were in force. Your proportion of such excess of loss, therefore, is one-third, or \$3,526.31." That it was intended that there should be \$15,000 of reinsurance obtained further appears from the fact that in addition to the two actually taken out and existing for \$5,000 each, there had been another policy for \$5,000 taken out in a company the name of which was not given; and although this was returned after it had been issued and before defendant's policy was written, it is significant of what the parties understood to be the agreement. Equally significant is the fact that in speak-

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ing of the \$15,000, in the clause from which we have quoted, it is said that plaintiffs had "no right of cancellation," which would seemingly indicate that they had agreed to secure and maintain the full amount of \$15,000. Here, if the rule of construction is to be applied that it will be presumed that the parties intended to express something by the language used, and if the practical construction which the parties themselves have placed upon the contract is to govern, then it seems to us that the view for which the defendant contends should prevail in holding that it was the intention to have reinsurance to the extent of \$15,000, and that under the defendant's policy of \$5,000 it was to be responsible in the proportion that the latter bore to the \$15,000, viz., one-third of the loss. For this alone, therefore, the plaintiffs are entitled to judgment.

The judgment as entered should accordingly be modified to that extent, and as so modified affirmed, without costs.

All concur.

PEOPLE EX REL. ALBERT T. PATRICK, APPELLANT, v. FRANK T. FITZGERALD, AS SURROGATE, ET AL., RESPONDENTS.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—JUNE 1, 1902.

§§ 2568, 2617, 2636, 2637, 2638.

Writ of Prohibition. Probate Proceedings Involving Two Contested Wills.

A writ of prohibition lies only where there is a want of jurisdiction or where the court, judge or other tribunal is proceeding in excess of the jurisdiction conferred.

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Authorities regarding it as applicable to prohibit proceedings "contrary to the general law of the land" refer to proceedings without permitting a party to be heard, and this means no more than excess of jurisdiction.

Errors of law or procedure must be corrected by appeal, and a writ of prohibition is not designed to regulate admission or rejection of evidence or the proceedings of an inferior court having jurisdiction.

The right to an adjournment rests in discretion, reviewable only by direct appeal, and the question of an adjournment of civil proceedings, arising out of the same facts as pending criminal proceedings, until the determination of the criminal proceedings, is not a matter of strict legal right, reviewable by prohibition, but involves the exercise of discretion, reviewable only by direct appeal.

A surrogate has jurisdiction to decide whether to dismiss probate proceedings for want of proof, or to continue the proceedings to permit the presentation of further evidence, and his dismissal for want of proof would not be a dismissal upon the merits.

A claim of privilege against self-incrimination, advanced by subscribing witnesses to a will under indictment, as an excuse for not testifying to the execution of the will, may properly be sustained.

Though non-resident executors, authorized by a will to serve without giving bonds, might remove the property of the estate from the State, the surrogate may require security of them. Held that there is no reason to believe that contestants' rights will not be protected.

An executor named as such and as residuary legatee in a later will, may contest an earlier will, unless he has lost the right by not doing so at the proper time. He has such right and is interested in the estate, though unable to prove the later will in the manner required by the statute to establish such will.

Only one failing to appear is in "default" within the meaning of Code Civil Procedure, section 2568, permitting appeals, except by one "in default."

A decision on appeal in prohibition proceedings is not to be construed as an approval of rulings in the inferior court on evidence, practice, procedure and discretion, such as are reviewable on direct appeal.

Where a court refuses to grant an absolute writ, upon return to an

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alternative writ of prohibition, a stay pending appeal from the final order refusing the absolute writ is unauthorized.
(Decided June, 1902.)

Appeal by relator from a judgment of the Special Term of the Supreme Court entered in the Clerk's office of the County of New York on the 21st day of May, 1902, denying his application for a writ of prohibition absolute and quashing and dismissing the alternative writ.

The alternative writ shows that proceedings have been duly instituted and are pending undetermined in the Surrogate's Court of the County of New York for the probate of two alleged wills of William M. Rice, deceased, bearing date respectively on the 26th day of September, 1896, and 30th day of January, 1900; that the subscribing witnesses to the last will have been indicted for forgery and perjury concerning the same, and upon that ground have refused to testify with reference to the execution thereof, and that the surrogate has sustained their claim of privilege; that the relator is the proponent of the last will and that the Surrogate's Court, "without taking such and other evidence, is about to render a decree admitting to probate said will of 1896, and dismissing the proceedings for the probate of said will of 1900." The alternative writ required the respondent and the surrogate to show cause why they should not be absolutely enjoined and restrained from taking further proceedings with reference to the probate of either of said wills until after the trial of these indictments against the subscribing witnesses or until their evidence can be lawfully obtained. The returns raise no issues of fact, but challenge the sufficiency of the moving papers to warrant the granting of an absolute writ. The alternative writ was granted on the affidavits of the attorney for the relator, of the subscribing witnesses who have been indicted, and of one Scheflin and one Cantwell. The affidavit of the attorney shows, among other things, that the testator died on the 23d of September, 1900, leaving property worth more than \$5,000,000; that

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three executors are named in each will, two being the same, John D. Bartine being the third in the first, and the relator being the third in the last; that the will of 1896 was filed on the 12th day of October, 1900, and the other on the 30th of November thereafter, and applications for their probate were duly made by Bartine and the relator respectively; that the first will left the bulk of the estate to the William M. Rice Institute for the Advancement of Literature, Science and Art, a corporation of the State of Texas; that in the second will this corporation was given a legacy of a quarter of a million and the bulk of the estate was left to the relator; that the relator and the heirs and next of kin of the testator filed objection to the probate of the first will, and Bartine and others filed objections to the probate of the second will; that the executors of the first will are all non-residents, and it is provided that they shall not be required to give security; that as the result of criminal proceedings instituted against the relator for the murder of the testator and for the forgery in connection with the second will, he was indicted for such murder and forgery on the 25th day of April, 1901, and that contemporaneously therewith criminal proceedings were instituted against the subscribing witnesses to the last will for perjury in testifying concerning its execution in the criminal proceedings against the relator and for forgery in connection with it also; that the relator has been convicted of murder and an appeal from such conviction is pending in the Court of Appeals; that the indictments against the subscribing witnesses have not been brought to trial; that on the 22d day of June, 1901, before any evidence was taken, the surrogate adjourned these probate proceedings on account of the pendency of said criminal proceedings until November, 1901; that on the 23d of November last a settlement was made between heirs and next of kin and the said William M. Rice Institute by which their objections to the probate thereof were to be withdrawn and said institute should pay them

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about half a million dollars; that two days later the hearing on the probate of said wills came up and the subscribing witnesses to the first will were examined and the hearing adjourned until the 9th of December; but the making of the settlement was not disclosed, and the objections of the heirs and next of kin were not withdrawn until the 7th day of January, 1902; that no further proceedings were taken in the Surrogate's Court until the 16th day of April, 1902, after the trial and conviction of the relator; that on said last mentioned day the present attorney for the relator, who had only recently been retained, had been previously informed by the counsel, who therefore represented the relator on the probate proceedings, that a hearing would be forced at that time, applied for an adjournment on the ground of the pendency of the criminal proceedings against the relator; that the subscribing witnesses who had been indicted would claim their privilege and refuse to testify, and that he was not familiar with the various litigations and was not prepared to proceed; that the surrogate denied the motion, but stated that the right to cross-examine the subscribing witnesses to the first will, who had given the formal proof as to its execution, had been reserved to the relator; that the attorney for the relator, in applying for said adjournment, stated that he did not waive his right to cross-examine said witnesses; that he then called the subscribing witnesses who had been indicted and upon being sworn and interrogated concerning the execution of the will they refused to testify, upon the ground that their answers might tend to incriminate them, and the surrogate sustained their claim of privilege; that thereupon he contended that the surrogate had no power to proceed to a decree admitting either will to probate and asked leave to submit a brief on the question, whereupon the surrogate stated: "That would be a matter that would come up in the final argument when the whole case is in"; that thereafter, on six hearings, from April 16 to May 1, the counsel for the proponents of the first will called and

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examined witnesses as to their opinion of the genuineness of the signature to the last will; that while cross-examining these witnesses he had handwriting experts in court whom he announced that he intended to call as witnesses in rebuttal later; that he asked that one of these witnesses be recalled or that his testimony be stricken out and on the 1st day of May announced that he would apply "in due course" for an order to take the deposition of the witness who had departed from the State; that on the last mentioned day counsel for the proponents of the first will moved, at the close of the examination of the last witness called by the proponents, for a decree admitting to probate the first will and dismissing the petition for the probate of the last will; that he objected to this motion and claimed the right to call witnesses in rebuttal, and stated that he expected "in due course of the proceedings" to introduce testimony under the objections filed by the relator to the first will, but that the surrogate announced that he was prepared to admit the first will to probate and dismiss the proceedings for the probate of the last will for a failure of proof on the part of the proponents of the *factum* of the will of 1900; that the counsel for the proponents offered to withdraw his motion if the witnesses would withdraw their privilege and testify, and in this the surrogate acquiesced; that after a protracted argument the surrogate consented to adjourn the proceedings until the 10th day of May, 1902, stating that if on the adjourned day the subscribing witnesses still claimed their privilege he would admit the first will to probate and deny the probate of the second will and decline to take further testimony, notwithstanding the fact that the relator's attorney asked the right to call witnesses who would testify to the genuineness of the signature to the last will and a witness who would testify that the testator informed him that he was going to and had made a new will; that he in good faith intends to contest the first will and to show the validity of the second will; that, in his opinion, the first will is void and the Rice

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Institute cannot take under the laws of Texas; that if the first will is admitted to probate the property will be removed from the jurisdiction of the court, and that the relator will be without remedy and that the proposed action of the surrogate is in excess of jurisdiction.

The extract from the stenographer's minutes, quoted in the affidavit of the attorney for the relator, does not show that he informed the surrogate that he desired to introduce further evidence. These are the only material facts shown.

John C. Tomlinson, Francis L. Wellman, Wm. W. Gooch and Edgar J. Kohler, for relator-appellant.

Wm. B. Hornblower, John M. Bowers, James Byrne and Leo N. Levi, for respondents.

LAUGHLIN, J.—The writ of prohibition only lies where there is a want of jurisdiction, or where a court, judge or other tribunal is proceeding in excess of the jurisdiction conferred (*Quimbo Appo v. People*, 21 N. Y. 531; *People ex rel. Jones v. Sherman*, 66 App. Div. 231; *People ex rel. Smith v. Doyle*, 28 Misc. 411, 44 App. Div. 403, 162 N. Y. 659; *Thomson v. Tracy et al.*, 60 N. Y. 31; *People ex rel. Mayor v. Nichols*, 79 N. Y. 582; *People ex rel. Oakley v. Berry*, as District Attorney, 32 Hun, 443; *People ex rel. Sprague v. Fitzgerald*, 15 App. Div. 559; *Smith v. Whitney*, 115 U. S. 167).

We find it stated by some judicial writers, following the old English cases, that the writ may also be issued to prohibit the court, judge or other tribunal from proceeding contrary to "the general law of the land." This doubtless means nothing more than passing upon personal or property rights without a hearing. It embraces cases where a petition, pleading or objection is duly served or filed in accordance with the settled law or practice, and a court, judge or other tribunal having jurisdiction and whose duty it is to hear and determine the matter is proceeding to a determination without a hearing (*Hovey v. Elliott*, 167 U. S. 409, aff'g 145

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N. Y. 126). That, I take at, would be an excess of jurisdiction and I do not understand that the phrase "contrary to the general law of the land," as thus used by the courts, means anything more than an excess of jurisdiction. It is not the office of a writ of prohibition to regulate the admission or rejection of evidence or the proceedings before an inferior court, judge or other tribunal having jurisdiction of an action or proceeding. Where jurisdiction exists errors of law or procedure must be corrected by such appeal or other review as the law affords (People ex rel. Mayor v. Nichols, *supra*; People ex rel. Smith v. Doyle, *supra*; People ex rel. Oakley v. Berry as District Attorney, *supra*; People ex rel. Reynolds Card Mfg. Co. v. Fourth District Court, 13 Civ. Pro. Rep. 134).

If the relator's right to the absolute writ depends upon the sufficiency of the facts recited in the alternative writ, as is the case in *mandamus* proceedings, it scarcely needs any argument to show that those facts are insufficient. The alternative writ merely recites that the subscribing witnesses to the will of 1900 who have been indicted for perjury have to testify to the execution of that will and that the surrogate has sustained their claim of privilege and is about to dismiss the proceedings for the probate of that will and admit the other to probate. The surrogate and respondent were required to show cause against an absolute writ enjoining both probate proceedings until the testimony of these witnesses is obtained.

It is clear that the surrogate has jurisdiction. What adjournment, if any, should be granted rests in the sound discretion of the Surrogate's Court, subject only to review by direct appeal to the Appellate Division. There is no presumption of law that either will is valid, and neither can be admitted to probate without competent proof of its due execution (Matter of Cameron, 47 App. Div. 120, *aff'd* 166 N. Y. 610; Matter of Lasak, 131 N. Y. 624).

The relator is not entitled as matter of strict legal right

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to have the probate proceedings adjourned until the disposition of either of the criminal prosecutions (*Matter of Fleming*, 5 App. Div. 190; *Cook v. Ellis*, 6 Hill 466; *Quimby v. Blackie*, 63 N. H. 67; *Commonwealth v. Bliss*, 1 Mass. 32; *Adams v. Westcott*, 61 How. Pr. 138). The verdict or judgment in the criminal cases would not be *res adjudicata* on any question in the probate proceedings. Nor is the relator, as a matter of strict legal right, entitled to have the probate proceedings adjourned indefinitely to enable him to obtain this testimony. The Surrogate's Court undoubtedly has power to postpone these probate proceedings until after the trial on the indictments against the witnesses; but if this discretion to adjourn or refuse the adjournment be erroneously exercised or abused, the remedy is by appeal, and not the resort to the writ of prohibition.

It is not shown in the alternative writ that the first will has not been duly proved. The Surrogate's Court has jurisdiction to determine whether it has given the relator, who is the proponent of the will of 1900, a reasonable opportunity to make proof of its due execution, and whether the proceedings should be dismissed or probate denied for failure of proof, or continued to afford him an opportunity to present further evidence. The dismissal or denial of probate for failure of proof will not be a dismissal upon the merits. It will merely dispose of the present proceedings and be a determination that no satisfactory proof that the alleged will of 1900 is the last will and testament of the testator has been presented.

It seems to be assumed by the counsel for the respondent, as well as the appellant, that the right to the absolute writ depends not on the recitals in the alternative writ, but on the affidavits upon which it was granted, and, without stopping to examine the question, that may be assumed for the purpose of this appeal.

We think the affidavits presented by the relator fail to show sufficient facts to entitle him to the absolute writ. It

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thereby appears that the will of 1896 has been duly proved and that evidence has been given tending to show that the later will is a forgery. When the relator's present attorney first appeared in the probate proceedings the surrogate informed him that the right to cross-examine the subscribing witnesses to the first will had been reserved to the relator; but it does not appear that he asked to examine them then or on any of the subsequent adjourned hearings. Nor does it appear that the relator at any time offered any evidence with reference to the validity of either will or asked to have his witnesses examined. It does appear that he informed the court that he intended to produce evidence; but that is not sufficient to afford a basis for issuing an absolute writ of prohibition against the surrogate upon the theory that if the relator does in the future offer competent evidence it will be rejected, even though his right to introduce testimony has not been waived or lost. There is nothing to justify the inference that the learned surrogate had not acted judicially and with perfect fairness throughout the probate proceedings. His remarks indicate that he thinks it is about time that the hearings on these proceedings should be concluded, but the inference that the surrogate contemplates depriving the relator of any of his legal rights is not warranted. It may be that the surrogate entertains the belief that the relator is responsible for the refusal of the subscribing witnesses to testify. It appears that these witnesses have testified with reference to the execution of this will on the criminal proceedings instituted against the relator. The entire record of these proceedings and of the probate proceedings are not before us, and we cannot say that there is nothing to warrant such an inference. However this may be, the learned surrogate was right in sustaining the privilege claimed by the witnesses (*People ex rel. Morse v. Nusbaum*, 55 App. Div. 245; *People ex rel. Toy v. Major*, 71 Hun, 182; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219). It is contended by the relator that inasmuch as the executors of the

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will of 1896 are all non-residents, if that will is admitted to probate they may remove the property from the State before he is able to establish the validity of the will of 1900. This does not go to the jurisdiction of the surrogate. Moreover, notwithstanding the fact that the will relieves the executors from giving a bond, the surrogate is authorized, on account of their non-residence, to require security to be given, and there is no reason to apprehend that the rights of the relator will not be properly protected (Codes of Civil Procedure, secs. 2636, 2637 and 2638; Estate of Demarest, 1 Civ. Proc. Rep. 302).

If the relator has not lost his rights by failing to introduce his evidence on the objections filed to the probate of the will of 1896, and on his petition for the probate of the will of 1900 at the proper time, he will doubtless be afforded an opportunity to do so. Counsel for the relator is doubtless right in his contention that the relator is entitled on account of his claim as executor of the will of 1900, and as devisee thereunder, to contest the validity of the will of 1896, unless he has lost his right by not doing so at the proper time (Code of Civ. Proc., sec. 2617). While he may be unable to establish the validity of the will of 1900 in the manner required by the statute to authorize its probate, it by no means follows that he is not interested in the estate. He may be able to establish the validity of the will by common-law proof, which would be accepted in an action in the Supreme Court, concerning the ownership of the realty of the testator at least (*Upton v. Berstein*, 76 Hun, 516, 520; *Matter of Kellerman*, 126 N. Y. 79). It does not follow, therefore, that because he is unable to have the will of 1900 admitted to probate he is not interested in the estate. But there is no evidence that the surrogate has ruled that the relator is not entitled to contest the first will.

We are asked to construe a remark of the learned surrogate that the proponents of the will of 1896 were entitled to a decree admitting it to probate by default as indicating

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an intention on his part to enter a decree that will recite that the relator has defaulted and thereby preclude him from appealing. The relator has appeared in the proceeding and will be entitled to appeal from any decree that may be entered. Section 2568 of the Code of Civil Procedure relates only to a default in appearing. The learned surrogate evidently meant by default the failure of the relator to produce evidence at the proper time and the inference is not justified that he contemplates entering a decree reciting that it was made on the relator's default.

It is suggested by counsel for relator that if the writ be refused it will be taken as an indication that in the opinion of this court the surrogate may properly dismiss the proceedings for the probate of the will of 1900 and admit to probate the will of 1896. That would be an unwarranted inference. We refrain from expressing any opinion on questions of evidence, practice, procedure and discretion until they are properly before us by appeal. We merely hold that the surrogate has jurisdiction and is not proceeding in excess of his jurisdiction in a manner to justify issuing an absolute writ of prohibition.

The alternative writ was, therefore, properly quashed and dismissed and an absolute writ properly denied. The order should be affirmed, with \$50 costs and disbursements, and the surrogate and respondent are authorized to proceed in the matter of probating said wills as if the alternative writ had not been issued.

INGRAHAM, J.—I fully concur in the opinion of Mr. Justice Laughlin, and simply wish to add that in my opinion the provision in the order appealed from, that the stay of proceedings contained in the alternative writ of prohibition be continued pending an appeal to the Appellate Division of this court from the final order in this proceeding, is entirely unauthorized. A writ of prohibition prohibits a court from proceeding in a matter then before it. The only authority

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that the Supreme Court has to restrain a court from so proceeding is by a writ of prohibition. The court below granted an alternative writ, but upon a return being filed it refused to grant an absolute writ. The order refusing the absolute writ was a final order, under section 2100 of the Code of Civil Procedure, which provides that "where a final order is made against the relator it must authorize the court or judge and the adverse party to proceed in the action, special proceeding or matter as if the alternative writ had not been issued." Neither the Code nor the practice authorizes the Special Term, when a final order refusing an absolute writ is entered, to prohibit a court from proceeding by order, either pending an appeal from the order refusing the absolute writ or for any other period of time. The Special Term was required by the provisions of the Code applicable to a writ of prohibition, upon the return being filed, to determine whether or not an absolute writ of prohibition should issue. Upon its determination that such an absolute writ should not issue, the final order abrogates the alternative writ, and the prohibition contained in that writ is at an end. The Supreme Court was then without jurisdiction to continue the prohibition contained in the alternative writ by order.

I think it necessary to make this statement to avoid the implication that the practice adopted by the Special Term is in any sense approved.

All concur.

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PEOPLE OF THE STATE OF NEW YORK EX REL.
TARLETON H. BEAN, APPELLANT, v. GEORGE C.
CLAUSEN, AS COMMISSIONER, RESPONDENT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—JULY, 1903.

§§ 968, 2076, 2082, 2083.

Alternative Writ of Mandamus—Trial of Issues of Fact—Dismissal of Writ on Merits by Judge at Trial Term Erroneous—Verdict Should be Returned to and Final Order Made at Special Term.

After an alternative writ is granted and return made thereto and issues of fact gained thereon, the case becomes an action under the Code and is not a special proceeding.

The issues raised by an alternative writ are similar to issues of fact which arise in an equity action and which are sent by that Court to a jury for trial.

The jury must find upon the issues, and their finding must be presented to the Court upon the final hearing.

The judge presiding at the trial has no right to non-suit.
(Decided July, 1902.)

Appeal from judgment dismissing on the merits an alternative writ of mandamus.

Robert E. L. Lewis, for appellant.

Terence Farley, for respondent.

O'BRIEN, J.—The relator sought in this proceeding to obtain a peremptory writ of mandamus directing the respondent, as commissioner of parks, to restore to him the position which he occupied as Superintendent of the Aquarium at Battery Park, from which office he claims he was

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unlawfully removed. On the return day of the writ the respondent filed a return denying the material allegations in the petition, whereupon the Special Term directed that an alternative writ of mandamus issue so that the issues of fact raised by the relator's petition and the respondent's affidavit might be tried by a jury.

These issues were brought on to trial at Trial Term before a judge and jury, and at the close of relator's case, the respondent not offering any evidence, the trial justice dismissed the alternative writ of mandamus "on the merits."

The practice followed upon the trial we think was wrong. No questions were submitted to the jury, and, there being no direction of a verdict by the court, there was no warrant for a dismissal upon the merits. The course pursued was due, no doubt, to the conclusion reached by the learned trial judge, the relator failed to prove the allegations of his petition.

As said in Wait's Practice (vol. 5, page 590): "After an alternative writ is granted and return made thereto and issues of fact joined thereon, the case becomes an action under the Code, and is not a special proceeding." The procedure for an alternative writ of mandamus is regulated by chapter 16, title 2, article 4 of the Code of Civil Procedure; and by reference to sections 2076 and 2082 it will be seen that the petition of the relator with the affidavit or return of the respondent are regarded as pleadings in an action—the petition as the complaint and the return as the answer. And with respect to the issues of fact, the place where and how triable are also prescribed, and by section 2084 it is provided: "Upon the trial of an issue of fact joined upon an alternative writ of mandamus, the verdict, report or decision must be returned to and the final order thereupon must be made by * * * the Special Term." There is no sanction, therefore, for the practice which was here followed of the trial judge non-suiting the relator on the trial by a jury of issues raised by an alternative writ.

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The issues raised by an alternative writ are similar to issues of fact which arise in an equity action and which are sent by that court to a jury for trial.

The practice to be followed in an equity action has been long settled and understood and is well expressed in *Birdsall v. Patterson* (51 N. Y. 43). Therein it was said: "This was an equitable action and issues had been framed and ordered to be tried before a jury at the circuit. These issues were upon trial at the time this motion was made. The action was not upon trial and the whole case was not then before the court. These issues, like feigned issues under the old chancery practice, were ordered to be tried so that the court could have the findings of the jury upon the final hearing of the whole case for the information of its conscience. The order of the court framing the issues and ordering them to be tried is not satisfied by the finding or decision of the judge holding the circuit. The jury must find upon the issues, and their finding must be presented to the court upon the final hearing. If they find upon insufficient evidence, the party aggrieved has his remedy by a motion for a new trial according to the practice prescribed in Supreme Court Rule No. 33. The judge presiding at the trial of the issues has no right to a non-suit."

The disposition to be made of issues raised by an alternative writ of mandamus which are in the nature of issues settled in a court of equity and sent to a jury is thus stated and the proper practice correctly outlined in the appellant's brief: "Where material allegations in a petition for the peremptory writ are denied by the respondent, and the Special Term directs the issuance of an alternative writ so that the issues of fact may be tried by a jury, the verdict of a jury upon the trial of the issues of fact raised by the alternative writ is for the benefit and guidance of the Special Term in determining whether or not to issue a peremptory writ of mandamus. An alternative writ of mandamus corresponds exactly with an order of the court framing and

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settling issues of fact in an equity case to be sent to a jury. In both instances the court, through the jury's verdict, seeks enlightenment as to the facts in order that the correct principle of law may be applied upon the application for the final order or upon the application for the peremptory writ of mandamus as the case may be."

Even though there had been, therefore, a failure of proof on the part of the relator, the learned trial judge could not in such a case any more than upon the trial of any other action where there was mere failure of proof dismiss "upon the merits" because, under such circumstances, the merits are not involved. If the insertion of these words were the only error, we might correct it by striking out the provision "upon the merits," but this would not reach the principal error which we think was committed which consisted in the practice followed upon the trial. It would have been proper for the learned trial judge in the absence of proof to have directed a verdict upon the issues, or, upon conflicting evidence, to have submitted the issues for the determination of the jury; but what the Code practice prescribes is that the disposition of the entire proceeding shall not be made at the Trial Term, the provision of the Code being that "the verdict * * * must be returned to and the final order thereupon must be made by the Special Term." Whether or not issues of fact under an alternative writ of mandamus shall or shall not be sent for a jury trial is not discretionary with the Special Term, but where such issues are presented, the relator is entitled as matter of right to have a jury trial thereon, and the judge at Special Term is bound to send them to a jury (secs. 2083 and 968, Code of Civil Procedure).

Without discussing the merits, therefore, or passing any opinion thereon, we think, for the reason that the practice followed was wrong, that the judgment appealed from must be reversed and the issues again sent to the Trial Term to be disposed of by a jury. Accordingly so ordered, with costs to appellant to abide the event.

In the Matter of Nina M. Nutting, Committee of Thos. B. Nutting.

VAN BRUNT, P.J., and McLAUGHLIN, J., concur.

HATCH and INGRAHAM, JJ., concur, and also think that a question of fact was presented, and that it would have been error to direct a verdict.

IN THE MATTER OF THE SECOND INTERMEDIATE
JUDICIAL ACCOUNTING OF NINA M. NUTTING,
COMMITTEE OF THE PROPERTY AND ESTATE
OF THOMAS B. NUTTING, AN INCOMPETENT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—JULY, 1902.

§ 2729.

Appeal—Questions Considered—Accounting by Committee—Burden of Proof—Expenditures—Production of Vouchers—Claims Allowable—Correction of Account—Authority of Appellate Division.

Where the first account of the committee of a lunatic is confirmed by the court with the acquiescence of all the interested parties, and is not attacked on the contest of a second account, it will not be considered on an appeal from the settlement of the latter account.

The first duty of the committee of a lunatic is to provide for the comfort and care of the lunatic so far as is compatible with his estate, but, if he receives such care, it is immaterial that he is kept in a hospital where no charge is made for his care, or where his services are sufficient to pay therefor.

The committee of a lunatic who keeps the lunatic in a hospital which only receives his services as compensation has the burden, on accounting, to show that the lunatic receives the care to which the condition of his estate entitles him.

Code Civ. Pro., section 2729, authorizing the allowance, without vouchers, of expenditures by administrators of items not exceed-

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ing \$20, the total not to exceed \$500, applies to the committee of a lunatic.

The committee of a lunatic is not entitled, on accounting, to the allowance of sums paid to herself, the purpose thereof not being shown, or for money used to pay a bill for the estate of a third person, or for money expended for charity.

The Appellate Division of the Supreme Court has no authority, on an appeal from an order confirming the account of the committee of a lunatic, to correct the account. (S. c. 77 N. Y. Supp., 696.)
(Decided July, 1902.)

Appeal by the special guardian of the incompetent from an order as resettled by order of the court, confirming the report of a referee, settling, determining and allowing the second intermediate account of Nina M. Nutting, as committee of an incompetent person.

On February 19, 1895, the respondent, Nina M. Nutting, was appointed by the Supreme Court a committee of the property and estate of Thomas B. Nutting, Jr., her husband, an incompetent person. The petitioner and her husband were residents of New Jersey, and the incompetent was engaged in business in the City of New York as an insurance broker.

The petitioner had previously been appointed guardian of the person of her husband in the State of New Jersey. The only property possessed by the incompetent in the State of New York or elsewhere, except the amount in the hands of his committee, is certain articles of office furniture, used by him in conducting the insurance brokerage business in the City of New York, and valued at \$250. His only source of income is his share in the profits of the insurance business.

The order appointing the respondent as committee provided that she be authorized to continue the said insurance business, and apply the profits and income of said business, so far as the same shall be necessary, to the payment of the debts of the said Thomas B. Nutting, Jr., if any, and for his maintenance and that of the said Nina M. Nutting, and

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for the maintenance and education of their three minor children.

The insurance business is now conducted by one Eckert, under an agreement made between him and said committee, whereby she is to receive one-half of the gross receipts of the commissions and profits thereof, in behalf of the incompetent. In December, 1900, the petitioner filed her second intermediate judicial account, and on the 10th day of January, 1901, applied to the Supreme Court, New York County, for the settlement thereof, and on that day an order was duly entered sending said accounts to a referee, to examine, hear and determine the questions arising upon the settlement thereof, and George H. Hart, the appellant herein, was appointed special guardian of the said incompetent.

The income derived from the incompetent's business between February 1, 1898, and October 9, 1900, and paid over to said committee, amounted to \$9,089.65, including the sum of \$236.13 received for rent.

The committee secured the commitment of the incompetent to the State Hospital at Morris Plains, in the State of New Jersey, as a charity patient; the hospital being maintained by the State as a charitable institution for the insane. Nothing is paid by the committee for his care and maintenance, and he performs certain duties in looking after other patients.

The committee, in her account, alleges that she has expended \$8,260.41, which was for the maintenance of herself and children for the period between January 31, 1898, and October 9, 1900. This should leave in her hands as a balance \$829.24, but this balance is merely nominal, for out of it she has procured an order authorizing her to retain for herself \$252.24 for commissions, and to pay her attorneys \$150, to the special guardian \$100, and to the referee \$125, amounting to the sum of \$627.24, leaving the actual balance \$202. She shows that she has consumed this money for the benefit of herself and children, but in accounting there-

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for she has failed to furnish vouchers for the amount of \$2,183.24 expended in many items.

The referee reported that the said amount as filed was just and true, and in conformity with the law, and should be allowed, and upon the report of the referee coming before the court for confirmation it was ordered that the said report be confirmed; from such order this appeal is taken.

George H. Hart, for appellant.

Albridge C. Smith, for respondent.

HATCH, J.—So far as the first accounting is concerned, while the items of that account appear in the record, yet no attack is made thereon, and all the parties in interest acquiesced therein, and the court having confirmed the same, we must regard it as finally settled, and not the subject of review upon this appeal. This conclusion leaves alone for our consideration the exceptions which were taken to the report of the referee in the allowances which have been made to the committee in her account. By the terms of the order appointing her such committee, the first provision, after a direction of payment of the incompetent's debts, is to pay from the profits and income of the business conducted by the committee such sum as shall be necessary for the maintenance of the lunatic. It is conceded that the lunatic has been placed in the asylum as a charity patient, and that the committee has paid nothing for his maintenance in any form; it is farther made to appear that he renders some service in caring for the other inmates therein, but whether such service is an offset to his being supported free of charge is not made clearly to appear. The committee would be guilty of no impropriety or of neglect in the discharge of her duties to the incompetent by procuring him to be cared for in a State institution for the insane without charge if thereby he was properly cared for and maintained, so far as consistent with the restraint necessarily imposed upon him. The

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incompetent, however, becomes entitled to have and receive such care and maintenance as is essential to his comfort, so far as his estate warrants. This is the first and primary duty imposed upon the committee after the payment of debts, and the neglect to minister to his care and comfort, so far as is compatible with the value of his estate, is a neglect of the committee to discharge a plain duty imposed by the order appointing her (*Matter of Reed*, 22 App. Div. 328, *aff'd* on appeal, 160 N. Y. 702; *Matter of Colah*, 3 Daly, 529; *May v. May*, 109 Mass. 252). If he receives such care and maintenance without any charge upon his estate, the committee will have discharged her duty in this respect, but it devolves upon her to show that such is the fact, and it becomes the duty of the court to see and also enforce the performance of this duty, if the committee has failed to properly discharge the same. In the record before us, such fact was not made to appear, and it is not an unfair inference to draw that a charity patient does not receive the same care and comfort as one for whose care and maintenance payment is made. It may be that his attendance upon other patients, when his mental capacity permits of the discharge of such duties, is of benefit to the incompetent; and it may be that such duties would be performed by him if payment for his support and maintenance was made by the committee; but these facts should all be made to appear in order that the court may be enabled to see that the committee has discharged her duty in this respect. The present record is barren of proof showing such fact. It becomes the duty of this court, therefore, to direct that proof be taken upon the subject.

The expenditures from the estate of the lunatic for which vouchers were produced seem to be correct. It appears, however, that \$2,183.24 has been expended for which no vouchers whatever were produced. So far as the items which go to make up this sum are small in amount, it would be entirely proper to make allowance therefor within the limitations

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permitted by law, the account containing such items being produced by the committee, and the expenditures verified by her statements under oath. By the provision of section 2729 of the Code of Civil Procedure, such items of expenditure may only be allowed without a voucher when the item does *not* exceed \$20, and the whole amount of such items so allowed shall not exceed in the aggregate \$500. This provision of the Code is applicable to accountings of committees of incompetent persons (Matter of Chpman, 43 App. Div. 231; reversed 162 N. Y. 456, but not upon this point, nor was the construction which the court below gave to the sections of the Code covering such accountings at all disturbed). While it may entail some inconvenience upon the committee to produce vouchers for small items of expenditures, yet the law requires vouchers to be produced within the limitations provided for in the Code. It is clear from an examination of the account that the referee was not justified in passing the accounts of the committee in a sum over four times the amount authorized by the Code without the production of vouchers. This account is also subject in this respect to an objection upon the merits. It appears from the account in the book kept by the committee that there were several items of expenditure, one as high as \$56, and several items above \$20. For these disbursements no warrant in law exists for allowing, unless a voucher be produced, or by showing its loss or destruction by competent proof. It is evident, therefore, that the referee was wrong in allowing and the court in confirming the accounts to this extent.

The item of \$169.85 under date of July, 1899, was also improperly allowed, as the only proof with respect to this item was the statement of the committee that she paid it to herself, but for what purpose does not appear. The only voucher is a check. The payment July 1, 1898, to estate of Mary D. Moore of \$15 was improperly allowed, as the committee testified that this was a loan to pay a bill of her

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mother's estate. The account also shows that small sums have been devoted to charity, amounting in the aggregate from \$12 to \$15 or more. We find no justification for these items.

The order appointing the committee also provides for the maintenance and support of the committee and her children and the education of the latter. It is, therefore, evident that the committee's position in view of the limited character of the estate requires economy in the discharge of her duties. Her account should not be subject to captious objection, and considerable liberality should be observed in passing upon it. In view of the circumstances we should not have regarded the last named expenditures, to which we have called attention, as sufficient to interfere with the affirmance of the order confirming the report of the referee. A sensible and just adjustment of the small matters may be easily arrived at, but as to the condition of the lunatic and his needs, the allowance of items in excess of \$20 for which no voucher is produced, and the passing of accounts for less than that sum, in excess of \$500 in the aggregate, are without warrant of law, and require correction at our hands. The guardian, who brings this appeal, was justified in calling the matter to the attention of this court, and the service which he has rendered to his ward is commendable. It might be possible on this appeal, perhaps, to correct this account, but we have no power to do so (*Matter of Chapman*, 162 N. Y. 456).

The order of confirmation should, therefore, be reversed, and the proceeding remitted to the court below for further action, with costs to the special guardian payable out of the estate.

All concur.

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IN THE MATTER OF THE APPLICATION OF
SOPHIE D. SCHOELLER.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—JULY, 1902.

§§ 870, 871, 872-876.

Order for Examination to Enable Plaintiff to Frame Complaint Vacated—Attempt to Procure Deposition of Person not Expected to be Made a Party.

The purpose of the examination is apparent. It is to ascertain whether the plaintiff has a cause of action.

The rule is well settled that an examination of this character cannot be had for the purpose of ascertaining whether or not the plaintiff in a proposed action has a cause of action.

There is no power given to take the deposition of a person not a party to an action or not expecting to be made a party to the action before the action is commenced.

(Decided July, 1902.)

Appeal from an order denying a motion to vacate an order for the examination of a party for the purpose of enabling plaintiff to frame her complaint.

Ralph G. Miller, for appellant.

Louis S. Levy, for respondent.

MCLAUGHLIN, J.—On the 16th of July, 1901, the applicant was run into by an express wagon, upon which appeared the name of "Century Express," and she subsequently brought an action against one George W. Slingerland, to recover damages for personal injuries sustained, upon the theory that he, doing business under the name of the Cen-

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tury Express, was responsible for them. Slingerland interposed an answer in which he denied his liability, or that he was, at the time the applicant was injured, doing business under that name. The plaintiff thereupon discontinued the action, and subsequently obtained an order for the examination of Slingerland for the purpose of enabling her to frame a complaint in an action which she proposed to bring against the one responsible for her injuries, if that fact could be ascertained from such examination. The affidavit upon which the order was granted set out, in addition to the foregoing facts, that the Metropolitan Express Company had succeeded to the business formerly carried on by Slingerland, who is its manager and one of its directors, and that the New York Transportation Company claimed to have succeeded to the business of the Metropolitan Company, but that she was ignorant of and unable to ascertain when the Metropolitan Company succeeded to the business of Slingerland or when the Transportation Company succeeded the Metropolitan Company, and for that reason it was necessary and material for her, before bringing an action, to examine Slingerland in order to ascertain "who is the proper party to be made a defendant."

But these facts manifestly did not entitle her to the order directing the examination of Slingerland, and for that reason the motion to vacate should have been granted. The purpose of the examination is apparent. It is to ascertain whether the plaintiff has a cause of action against the Metropolitan Company or against the Transportation Company, and the rule is well settled that an examination of this character cannot be had for the purpose of ascertaining whether or not the plaintiff in a proposed action has a cause of action (*Matter of Anthony*, 42 App. Div. 66; *Matter of White*, 44 App. Div. 119; *Long Island Bottlers' Union v. Bottling Brewers' Protective Ass'n*, 65 App. Div. 459). That is precisely what was held in each of the cases cited, and in the *Matter of Anthony* it was also held that a

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"proposed defendant must be definitely, and not tentatively, named in the affidavit (Code of Civil Procedure, 872). And that it must also be made to appear that the applicant has a cause of action against such specific person."

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs.

VAN BRUNT, P.J., and INGRAHAM, J., concur.

INGRAHAM, J. (concurring).—I concur with Mr. Justice McLaughlin. By section 870 of the Code of Civil Procedure provision is made for taking the examination of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such court, at his own instance, or at the instance of an adverse party, or of a coplaintiff or a codefendant. Section 871, which provides for the deposition of a person not a party, only applies where an action has been actually commenced. By subdivision 6 of section 872 it is provided that if no action is pending it must be shown by affidavit that the person expected to be an adverse party is of full age, and a resident of the State, or sojourning within the State.

There is no power given to take the deposition of a person not a party to an action or not expecting to be made a party to the action before the action is commenced. This distinction is recognized by the Court of Appeals in *Merchants' Bank v. Sheehan* (101 N. Y. 176), where the court say: "On the whole, we are of opinion that the order issued in this case on the application of the bank for the examination of Sheehan, against whom the bank was about to commence an action, was authorized, and that he was in contempt for disobeying it."

HATCH, J. (dissenting).—I am unable to concur in the reversal of this order or in the reasons which are assigned therefor by Mr. Justice McLaughlin. The affidavit upon

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which the application for the order was based sets out a good cause of action in favor of the applicant and against the person or corporation who inflicted the injury, and such person or corporation is liable to respond in damages therefor if the facts averred in the affidavit are sustained by the testimony given upon the trial. In respect to the examination of the person for which the order provides, the affidavit states that the action is expected to be brought against the Metropolitan Express Company, as defendant; that such express company is a domestic corporation, having an office for the transaction of business in the Borough of Manhattan, City of New York; and that George W. Slingerland, the person to be examined, is the general manager and director of such corporation. After setting out the cause of action, the affidavit further proceeds to show that an action was brought against said Slingerland to recover damages for the injuries alleged, based upon the fact that Slingerland was carrying on business under the name of the "Century Express"; that the injury had been inflicted by an express wagon bearing such name; that after the commencement of the action, Slingerland interposed an answer which contained a positive denial that he was doing business under such name. After the service of such answer the plaintiff discontinued the action. The affidavit then proceeds to state that the Metropolitan Express Company has succeeded to the business formerly carried on by Slingerland under the name of the Century Express; that he is now a manager and director of such corporation; that just what time this corporation succeeded to the business of the Century Express deponent is unable to ascertain; that she has learned that the New York Transportation Company claims to have succeeded to the business of the Metropolitan Company; that deponent made application to Mr. Ralph G. Miller, the attorney for the transportation company, and who appeared as attorney for Slingerland in the action which was brought against him which was discontinued, for information con-

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cerning the relations of the aforesaid companies, and as to when each or both succeeded to the business of the Century Express Company, but that all information upon that subject was refused; that the person sought to be examined has knowledge of all the facts, and that such examination is necessary and material for the plaintiff for the purpose of framing her complaint and for the prosecution of the action.

It is not needful that we set out the facts alleged in the affidavit showing the cause of action existing in favor of the plaintiff. It is sufficient to say that a perfect cause of action is stated against the person or corporation inflicting the injury.

In *Merchants' Nat. Bank v. Sheehan* (101 N. Y. 176) it is decided that the provisions of the Code of Civil Procedure, sections 870-876, authorize an order for an examination before an action has been actually commenced, in a court of record, of the person or persons against whom the action is about to be brought, upon the application of the person who is about to bring the action. The granting of such order is within the discretion of the court, but the occasions will be rare when the power will be exercised by the court on account of a liability to abuse the process. This is the express holding of that case. It is evident from the present situation that this case falls within the class of cases to which the provision of law authorizing the examination applies. Persons and corporations ought not to be permitted to juggle with the rights of parties to whom they owe a duty or to whom they are liable to respond in damages for wrongs done by a scheme of reorganization under different names, and thereby furnish shelter for themselves when sought to be reached by legal process. It is evident in the present case that the wrong which has been inflicted is the subject of legal redress, and the plaintiff is only debarred from enforcing the same by a reorganization or transfers which are being used to shield the wrongdoer from responding in damages for the injuries inflicted. Such a condition ought not

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to be tolerated, and there can be no abuse of process when it is used for the purpose of uncovering or smoking out the wrongdoer. Examinations of an adverse party have been long authorized for the purpose of framing a complaint (*Glenny v. Stedwell*, 64 N. Y. 120; *Hutchinson v. Lawrence*, 29 Hun, 450). In Matter of application of Nolan (70 Hun, 536) the precise question which this appeal presents was decided adversely to the contention of the appellant. There the examination was sought of a person who was the superintendent of a mine, for the purpose of discovering who was the real owner of the same in order that a cause of action, which was set up in the moving papers, might be enforced against such owner. Mr Justice Herrick, in writing for the court, said: "This examination is not sought for the purpose of ascertaining whether the applicant has a cause of action, but to ascertain whom the cause of action is against.

"It sufficiently appears, I think, from the affidavits, that there is some doubt as to who are the owners or operators of the mine where the accident happened. * * * That it is necessary to enable the appellant to frame her complaint to ascertain who are the proper defendants, who were the owners or operators of the mine at the time of the accident, I do not think can be questioned. The allegation as to who were the owners or operators of the mine is a most necessary and important part of the complaint, and it seems to me that appellant is entitled to an examination to discover such necessary facts (*Sweeney v. Sturgis* 24 Hun, 162).

"The respondent Payette is a very proper person to examine for that purpose; he is the one who employed the intestate; he was, according to his own affidavit, the superintendent of the mine at the time of the accident, and presumably he knows who his employers were, and who were engaged in operating the mine; he would be a proper person as defendant in the proposed action, and, therefore, a proper person to examine as a party."

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This language finds precise application in every particular to the facts of this case, and, if it be sound in law, is decisive of this appeal in favor of the respondent. There, as here, an action had been brought by a party to recover damages, founded upon an accident, against a supposed owner of the mine; an answer had been interposed denying such ownership, or liability for the injuries, and the sole question, therefore, which the examination sought to obtain was the person or corporation engaged in operating the mine at the time of the accident. The sole purpose of this examination is to discover the person or corporation who was operating the business of the Century Express at the time the injuries were inflicted.

A like doctrine was held in *Matter of Weil* (25 App. Div. 173), where the Appellate Division of the Second Department decided that an examination was proper before service of the complaint in a case where an action was to be brought to enforce a claim for work done for a newspaper called the *Hebrew Standard*. Prior to the application, suit had been brought against the editor of the newspaper as its proprietor, and the defendant having interposed an answer denying that he was the party responsible, such action was discontinued and another action brought against the newspaper as a corporation, and the editor was served with the summons and complaint as a director. To this action answer was interposed denying that the corporation was the contracting party, and, thereupon, the second action was discontinued. Application was then made to examine the editor for the purpose of discovering who was the proper person against whom to bring the action. Order issued for the examination of the editor, and, upon appeal, such order was affirmed.

In *Long Island Bottlers' Union v. Bottling and Brewers' Pro. Ass'n* (65 App. Div. 459) the same court denied an application, holding that an examination of witnesses to enable the plaintiff to frame a complaint in an action not

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yet commenced could not be sustained. The Weil case (*supra*) was not cited in the opinion, nor commented upon. We are not called upon to attempt reconciliation of these two cases. The last decided case is based upon certain authorities in this department to be hereafter noticed.

It is evident that the cases to which we have called attention furnish abundant authority for the support of this order. It is claimed, however, that the cases in this department—Matter of Anthony & Co. (42 App. Div. 66) and Matter of White (44 App. Div. 119)—are opposed to this view of the law. It is not to be denied but that there are expressions in these cases and in the authorities which they cite which deny right in the court to grant the order the subject of this appeal. In Matter of Anthony & Co. (*supra*), the decision is made to rest quite largely upon Matter of Bryan (3 Abb. N. C. 289). In that case, however, the moving affidavit upon which the order was based did not show any cause of action in favor of the plaintiff against anybody, known or unknown, while the witness sought to be examined in that case bore no relation whatever either to the proposed defendant or to the proposed plaintiff, and it was not pretended that the witness could by any possibility become a party to the action. It was held that a witness as such could not be examined for the purpose of enabling a plaintiff to frame a complaint. The case did not determine that a person whose examination was sought under such circumstances as tended to show that he would be the party defendant was not a proper person to examine, as the case did not involve such question. The main ground for the decision proceeded from the fact that no cause of action was shown by the affidavit to exist in the plaintiff; and upon this ground the decision was unanswerable. Reliance was also placed in Matter of Anthony & Co. upon *De Lown v. De Lima* (66 How. Pr. 287). This was a Special Term decision by Mr. Justice Ingraham. It appeared clearly in that case that the purpose of the examination was to discover if the plain-

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tiff had a cause of action. The action was for slander, and the attempt was to find out the exact language used. Clearly, therefore, no cause of action was shown to exist in favor of the plaintiff. The opinion contains the statement that before an examination will be granted "it must appear that the plaintiff has a cause of action against the defendant." This language is laid hold of in support of a holding that the proposed defendant must be definitely and not tentatively named in the affidavit. It may be said that such construction of the language was not permissible as in that case, as we have observed, no cause of action was shown to exist either in favor of the applicant or against the defendant. The expression had application to the facts of that case, and nothing else, otherwise it was obiter.

Muller v. Levy (52 Hun, 123) was also cited in support of the last contention. The opinion in that case opens with the statement, "When a plaintiff, for the purpose of framing his complaint, obtains an order for the examination of a defendant before trial, he must establish by affidavit the existence of a cause of action in his behalf. * * * The affidavit upon which the order for the examination of the defendant Bernard Levy was granted does not state facts sufficient to show that a cause of action exists in favor of the plaintiff." And at the close of the opinion it is stated, "The application of the plaintiff to examine the defendant is fairly subject to the criticism that it is merely an attempt not to obtain information for the better statement of a known cause of action, but to find out whether he really has any cause of action at all. A party cannot be examined for this purpose." It is clearly evident, therefore, that neither of the last two cases cited, nor the Matter of Bryan (*supra*), furnish authority for the doctrine announced in Matter of Anthony. In each one of the three cases there was no cause of action stated in the moving papers in favor of the moving party, and under such circumstances it is conceded that a case for an examination is not made. The limitation which is placed upon the

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Merchants' Nat. Bank *v.* Sheehan (*supra*), in the Matter of Anthony & Co. (*supra*), I do not think is warranted. The effect of the decision seems to be that an examination may be had at the instance of one party of his adversary when it is contemplated by the moving party that his adversary is expected to be made a party. The affidavit in this case states that the moving party expects to bring an action against the Metropolitan Express Company, and it clearly appears that the person sought to be examined is such person as may be made a defendant. In the Matter of Anthony & Co. (*supra*), a cause of action was stated in favor of the plaintiff therein, so the case is authority for holding that unless the defendant is definitely named the examination may not be had; but with all deference to the learned judge who wrote and the court which decided that case, I am of opinion that its doctrine is not sustained by the authorities cited therein and that it is opposed to the current of authority. Matter of White (*supra*) was an application to examine a witness for the purpose of perpetuating his testimony. The court, however, held that it was a mere cover to obtain the name of the party who should be made the defendant, and, therefore, upon the authority of Matter of Anthony & Co. (*supra*) the application was denied. In that case it was not contended that the witness sought to be examined was expected to be made a party. Neither this case nor the Long Island Bottlers *v.* Bottling Brewers (*supra*) adds any strength to the Matter of Anthony & Co. (*supra*), as they all rest upon it.

I am of opinion that an examination may be had of a person against whom it is contemplated that an action may be brought, or of a witness who is shown to be possessed of information necessary and essential for the more complete statement of a cause of action shown to exist in the moving party, whether the information essential to be obtained relates to substantive matter required to be stated in the complaint or of the name of the defendant against whom

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the cause of action exists. The present case exemplifies the necessity for such holding, as it is evident that the party can only be discovered by successive actions or by uniting them all in one action and thereby subjecting the party to the payment of bills of costs for the misfortune of including the wrong parties. There is little danger of any abuse of the process of the court under such circumstances. It follows that the order should be affirmed, with \$10 costs and disbursements.

O'BRIEN, J., concurs.

**FRANCIS P. BURKE AND WILLARD S. BROWN, AS
GENERAL MANAGERS AND ATTORNEYS-IN-
FACT FOR ALL THE UNDERWRITERS AT NEW
YORK AND BOSTON LLOYDS, PLAINTIFFS, v.
BENJAMIN T. RHOADS, JR., DEFENDANT.**

SUPREME COURT—NEW YORK COUNTY—NOVEMBER, 1902.

§ 544.

*Lloyds Fire Insurance Policy—Limitation of Liability—Answer—
Defense.*

The clause in the Lloyds fire insurance policy limiting the liability of any underwriter, upon all policies issued or to be issued, is not void as against public policy and constitutes a valid defense to an action against an underwriter brought after the recovery of a judgment against the attorney-in-fact.

Section 544 of the Code of Civil Procedure is sufficiently broad in its terms to permit a defendant to set up as a defense in his answer

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in an action brought under a judgment, to which he was not a party, a subsequent modification of that judgment on appeal, although the modification occurred after the commencement of the action. A supplemental answer is unnecessary. The plaintiffs' remedy would, in any event, be a motion to strike out and not a demurrer.

(Decided November, 1902.)

William B. Ellison and *Arnold L. Davis*, for plaintiffs,
in support of demurrer.

John M. Stearns, for the defendant, opposed.

SCOTT, J.—This is an action against an underwriter of a so-called Lloyds insurance policy. The complaint contains the usual allegation showing the recovery of a judgment against this same defendant as general manager and attorney-in-fact for the underwriters of what was known as the Peoples' Fire Lloyds; that the defendant was himself an underwriter upon the policy upon which the loss occurred, and that the special funds designated in the policy as the primary source from which losses were to be paid have long since been exhausted. The defendant sets up two defenses, one to the whole cause of action, and one partial, to both of which plaintiffs demur for insufficiency. By the first defense the defendant seeks to avail himself of a limitation upon his individual liability contained in the policy. The complaint as it will be observed does not set forth the facts showing the loss under the policy or the amount of such loss as it would be necessary to do if the action were brought directly upon the policy, but merely alleges that there was a loss and that in an action against the general manager judgment was rendered fixing the loss and the liability upon the policy at a certain sum. This, of course, is the proper practice and finds its justification in a clause in the policy reading as follows: "No action shall be brought to enforce the provisions of this policy except against the general manager and attorney-in-fact as representing all the underwriters, and each of the underwriters hereby agrees to abide

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the event of any suit so brought as fixing his individual responsibility hereunder. Judgment entered in such an action shall be satisfied out of the premiums in the hands of the underwriters unexpended; if such premiums shall be insufficient, then out of the deposit made by the several underwriters; if both shall be insufficient, then out of the individual liability of the several underwriters as hereinbefore expressed and limited." From this clause in the contract, which alone furnishes a ground for this action, it appears that the several underwriters did not pledge their individual liability to an unlimited extent, but only as "hereinbefore expressed and limited." What that limitation was appears from another clause in the policy upon which the defendant relies, and which reads as follows: "The liability of each of the underwriters in case of any loss, and the amount insured by each underwriter shall be his proportionate part of the aggregate amount payable to the insured upon such loss, and no one of the underwriters shall be, in any event, liable under this policy for an amount exceeding five hundred dollars. In no event or contingency shall any underwriter herein be liable for any part of any other underwriter's liability herein, the liability assumed herein by each underwriter being separate and individual only, as if each underwriter had issued to the assured herein a separate policy, their liability being several and not joint. * * * and the total liability of each underwriter on all policies now or hereafter in force after the application of the total unexpended premiums, shall not exceed twenty-five hundred dollars, the original subscription of five hundred dollars each being therein included." The defendant alleges that as an underwriter of the Peoples' Fire Lloyds he has been compelled to pay and did pay after the issuance of the policy referred to in the complaint, on policies of insurance of said Lloyds, existing and in force at and after the time of issuance of plaintiffs' policy, and after the application of the total unexpended premiums, a sum greatly in excess of

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twenty-five hundred dollars, whence as he claims he has paid his total fixed liability as an underwriter and is not liable in any sum whatsoever to the plaintiffs. I am unable to see why this defense is insufficient. The only liability of defendant to plaintiff was that which was expressed in the contract between them, and that contract determines the nature and extent of the liability. When the defendant entered upon such a contract it was his right to place such limitations as he saw fit upon the obligations and liabilities which he assumed, and it was open to the plaintiffs to make the contract if its terms suited them, and to leave it alone if its terms did not suit them. The entering upon it was purely optional with them, but if they did enter upon it he was bound to take it as it was made. The whole contract must be read together, and being so read it clearly appears, so that any one reading the policy must have seen it, that the individual liability of each underwriter upon all policies outstanding or to be issued was not to exceed the sum named. There is nothing any more unreasonable in such a limitation than there is in any limitation an obligor may see fit to place upon his liability upon any contract he may see fit to enter upon. There is certainly nothing more unreasonable in the limitation than there is in the limitation placed by law upon the individual liability of stockholders in ordinary fire insurance companies. The partial defense to which the plaintiff demurs, sets up that on June 12th, 1902 (after the commencement of this action), the judgment against the general manager of the Peoples' Lloyds was reduced, on appeal, whereby the defendant, if liable at all, is liable in a less sum than that claimed in the complaint. Whatever liability the defendant may be under, depends upon the judgment against the general manager, and of course his liability is lessened or wholly obliterated, as the case may be, if that judgment be reduced or reversed. The defendant's point appears to be that, inasmuch as the modification took place after the commencement of the action, the

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plea of such modification should be contained in a supplemental, as distinguished from an original or amended answer. In my opinion this objection cannot properly be taken by demurrer, for the defense is sufficient upon its face, by whatever name the pleading containing it may be called. If the defense was improperly included in the present answer the proper remedy was to strike it out. The answer now before me is styled an amended answer. It does not show in what the amendment consists, but I am informed by brief of counsel that it does not consist in the insertion of this partial defense, which was included in the original answer. The question then is whether modification of the original judgment having taken place after the commencement of the action, but before answer, could properly be pleaded by the answer, or whether it was the duty of the defendant to first answer without reference to the modification, and then serve a supplemental answer setting up the modification of the judgment. The question seems to be answered by section 544, Code of Civil Procedure, which permits the service of supplemental pleadings "alleging material facts which occurred after the former pleading, or of which he was ignorant when it was made," the obvious inference being that facts which occurred before the original pleading was drawn should be included therein.

The demurrer must be overruled with costs, with leave to plaintiff to withdraw demurrer and rely upon payment of costs within twenty days.

NOTE ON LLOYDS POLICIES OF FIRE INSURANCE—COMPLAINT.

The complaint must follow the terms of the policy. There are various provisions as to bringing action and these must be followed as a condition precedent to recover. *Stieglitz v. Belding*, 20 Misc. 297; *Leiter v. Beecher*, 2 App. Div. 577; *Ketchum v. Belding*, 32 Misc. 506; *McCredy v. Thrush*, 37 App. Div. 456; *Lawrence v. Schaefer*, 20 App. Div. 80.

Where the policy provides that action is to be brought first against the attorney-in-fact, such condition is good. *Compton v. Beecher*, 17 App. Div. 38; 44 N. Y. Sup. 887; *Gough v. Satterlee*,

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32 App. Div. 33; although such an attorney is not an underwriter. *Fayem v. Fogg*, 16 Misc. 219; and this is so even where suit is first to be brought against one underwriter. *N. J. & P. Concentrating Works v. Ackerman*, 6 App. Div. 540.

There are, however, some early cases which at first held differently, but the subsequent decisions have either reversed or overruled them; see *Knorr v. Bates*, 14 Misc. 501; 35 N. Y. Sup.; *Biggert v. Hicks*, 18 Misc. 593; *Ralli v. White*, 20 Misc. 635; *affd.* 21 Misc. 285; 47 N. Y. 197.

In the case of *Isear v. McMahon*, 16 Misc. 95, the complaint of the plaintiff was sought to be tested on this very point by demurrer, as he had joined all the underwriters as co-defendants, but the Court failed to decide. Argument was had on it only at special term, and no appeal was taken from the decision.

Where the attorney-in-fact resigns prior to the liability, or has been removed, an action may be maintained under the terms of the policy against his successor as attorney-in-fact. *Wheelock v. Chapman*, 34 App. Div. 464.

It seems that such a provision where the attorneys-in-fact have been substituted, may be ignored. To this effect, *Ralli v. White*, 20 Misc. 635; *affd.* 521 Misc. 285; 47 N. Y. Sup. 197; *Am. Lucol v. Blanchard*, 26 Misc. 315.

EXECUTION—INDIVIDUAL UNDERWRITER'S LIABILITY.

It is a condition precedent in such an action against the individual underwriter to recover from him his proportionate share where the policy requires it that execution first issue. *Ketchum v. Belding*, 32 Misc. 506; but otherwise where the policy contains no such requirement. *Conant v. Jones*, 50 App. Div. 336; 64 N. Y. Sup. 189.

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GEORGE F. SHRADY, APPELLANT, v. ANNA B. VAN
KIRK ET AL., RESPONDENTS.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPART-
MENT—NOVEMBER, 1902.

§§ 1022, 1228.

*Unauthorized, Irregular and Improper Provisions in a Proponent—
Correction of Such Specified Irregularities—Jurisdiction of
Special Term—and Referee—Practice.*

Where a referee has been appointed to hear and determine, while the case is pending he has jurisdiction over the action and the right in connection with his report and decision to settle the form of the proponent.

After the report is taken up or filed the referee is *functus officio*.

The Court at Special Term has no power or authority to refuse the entry of a proponent substantially different from that prescribed in the report of the referee.

There is no provision of law which gives a referee the right to confer jurisdiction on the court to dispose of some untried question which was before him on the reference to hear and determine.

Where an error has been made in respect to the form of the proponent the error must be corrected, if at all, by motion in the court of original jurisdiction.

(Decided November, 1902.)

Appeal from order denying motion to correct, by reason of specified irregularities, a judgment entered on the report of a referee.

The action was brought by a beneficiary under the will of Maria Shrady, deceased, to compel the sale of a large amount of realty, for the removal of trustees, a settlement of their accounts, and other relief. The issues in the action were referred to a referee to hear and determine. His report was made on October 10, 1901, and filed in the office of

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the clerk on November 6, 1901. That report directed that the testamentary trustees should sell all such realty at public auction, but whether for cash, on bond and mortgage, on credit, or otherwise than cash, did not appear in such report. Subsequently upon notice, the referee, on January 11, 1902, approved a judgment as to form, wherein it was provided that such real estate should be sold in separate parcels, "with the privilege of allowing 60 per cent. of the purchase money to remain on bond and mortgage for two years." A motion was then made to confirm the report of the referee and for entry of judgment, and the court at Special Term, directed the entry of judgment in conformity with the form of judgment approved by the referee, which contained the provision quoted, that upon the sale of the property 60 per cent. of the purchase money should remain on bond and mortgage for two years. Thereafter plaintiff moved to strike out this and three other provisions in the judgment, upon the ground that they were unauthorized and irregularly and improperly inserted; which motion was denied, and from the order so entered, the plaintiff appeals.

Barclay E. V. McCarty, for appellant.

S. B. Brownell, for respondent Shrady.

Louis F. Doyle, for respondent Van Kirk.

Jacob Shrady, for John and Jacob Shrady.

O'BRIEN, J.—The principal question for our consideration is as to the right and power of the Special Term, after a reference to hear and determine, to insert the provision permitting the sales upon bond and mortgage. Incidentally the question of practice arises as to whether such a provision, if improperly inserted, can be stricken out on motion as an irregularity, or whether the plaintiff's remedy is not by appeal from the judgment. While the case was pending and the referee had jurisdiction over the action, he had the right, in connection with the making of his report and deci-

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sion, to settle the form of the judgment; but after the report had been taken up and filed, the referee was *functus officio* and had no further jurisdiction for the purpose of deciding any issue involved in the action. If we are right in this view, we are not aided in our consideration of the main question by the approval of the referee, two months after his report was filed, as to the form of the judgment, but must view the question precisely as though the referee, having the right to determine such form, had neglected to do so.

The question, therefore, narrows down whether upon the motion to confirm the report and settle the form of judgment the court had the power to insert the provision allowing sales on bond and mortgage.

In *Vagen v. Birngruber* (9 N. Y. St. Rep. 728) it was said: "the action being for equitable relief, the final judgment should have been a decree of the court, settled by the court, and entered upon its direction, the referee who tried the case not having reported the form of decree to be entered. Section 1228 of the Code in no way conflicts with this practice." Here, however, the sales were to be made by testamentary trustees, and, therefore, necessarily under the provisions of the will; and the will directed a sale of the realty, but was silent as to whether it was to be sold entirely for cash, or on credit, or otherwise than for cash. This being the situation, we think the general rule is applicable that the failure to authorize a sale on bond and mortgage raises the presumption of an intention that the property should be sold for cash. Where a testamentary disposition has been made directing the sale of realty, the invariable rule is that the sales shall be absolutely for cash, unless otherwise distinctly specified, and not for bond and mortgage nor on any credit plan.

Whether this question was considered by the referee is not made to appear further than that his report does not in terms do more than direct a sale of the realty, thus following practically the language of the will; and seemingly,

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therefore, the presumption would follow that in his view the sale should be solely for cash. When the motion was made to the court, therefore, we think it was without power or right to insert the provision essentially different from this and allowing the sale upon terms permitting the purchaser to give a bond and mortgage for 60 per cent. of the purchase price. As said in *Paget v. Melcher* (26 App. Div. 15), "the action was referred to a referee to hear and determine, and his report was made directing the judgment to be entered. In that case the report stands as the decision of the court (Code Civ. Pro., sec. 1228), and by the provisions of that section the clerk was required to enter judgment upon it when its form has been settled by the referee. Although it has been deemed necessary in this department that there should be a direction of the court for the entry of the judgment, yet when entered, it must be the one directed in the report of the referee. The court at Special Term when a motion is made for leave to enter the judgment, has no power or authority to give directions which shall require the entry of a judgment substantially different from that prescribed in the report of the referee (*Kennedy v. McKone* No. 2, 10 App. Div. 97). The judgment to be entered upon this report is to be reviewed in the same way as one entered upon a decision of the court, for the report has the same effect precisely as such decision. The manner in which it is to be reviewed is prescribed in section 1022 of the Code, and no authority is given to the court at Special Term to change or alter the directions given by the referee as to the entry of judgment. The application for judgment upon the report which is made to the court at Special Term is not for the purpose of a review of the correctness of the findings of the referee, but simply to furnish an assurance of regularity in the manner of entering the judgment, and to enable all parties to know that the judgment as entered conforms to the one directed in the report. There was, therefore, no authority in the Special Term to modify the conclusions of law

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found by the referee so as to enter a different judgment than that directed in the report."

We have already adverted to the fact that the referee, after he ceased to have control over the action, was of opinion, as appears from his approval of such provision in the form of judgment, that it should be inserted; but this does not aid us, because, as stated, when he expressed such approval he was *functus officio*, and, therefore, it is as though he had not attempted to exercise that power. It was the duty of the referee to decide every material question involved in the litigation, and he had no power to relegate or return any such question for decision to the court. The question as to whether, under the terms of the will, the property could be sold otherwise than for cash, involving as it did a construction of that instrument, was a material one, and it needs no argument to support the view that the referee could not refuse to pass upon such a question and then refer it back to the court. There is certainly no provision of law which gives a referee the right to confer jurisdiction on the court to dispose of some untried question which was before him on the reference to hear and determine. It was his duty to try and dispose, as said, of all the material questions, and upon the return of his report to the court, all that remained was for the court to settle the form of judgment accordingly. This, however, gave no power to the court to add to or take away from the judgment in a material respect, and the attempt to do so is a clear irregularity.

We have thus reached the conclusion that the court exceeded its power in inserting any such provision in the judgment. The question remains, however, whether the practice pursued by the plaintiff was right in moving to strike out the provision as irregular, or whether his sole remedy was by appeal from the judgment. Under the authorities to which we have adverted, we think the practice followed was right. As said in *Corn Exchange Bank v. Blye* (119 N. Y. 414): "We think the decisions are uniformly to the effect that when

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an error has been made in respect to the form of the judgment by which its scope or amount has been enlarged or increased beyond that plainly authorized by a verdict, referee's report or decision of a court, a question is not presented for the consideration of the court on appeal, but the error must be corrected, if at all, by motion in the court of original jurisdiction." It follows, accordingly, that the order appealed from should in this respect be reversed.

In regard to the three other alleged irregularities, we need add nothing to what was said by the learned judge in disposing of the motion at Special Term.

The order appealed from should accordingly be reversed and the motion granted to the extent indicated, and in all other respects affirmed, without costs to either party on this appeal.

MOLLAUGHLIN and LAUGHLIN, JJ., concur; VAN BRUNT, P.J., dissents.

GEORGE E. JOSEPH, AS TRUSTEE OF ESTATE OF
MUTUAL MERCANTILE AGENCY, RESPONDENT,
v. NORMAN C. RAFF, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—NOVEMBER, 1902.

§§ 3268, 3271.

Security for Costs—Action by Trustee in Bankruptcy.

An action by a trustee in bankruptcy falls within the provisions of section 3268 of the Code, and the defendant is entitled to security for costs as a matter of right unless the cause of action arose after the adjudication in bankruptcy.

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The opinion in *Joseph v. Makley* (73 App. Div. 156) qualified.
(Decided November, 1902.)

Appeal from order denying motion of defendant for security for costs.

William B. Ellison and *Walter L. McCorkle*, for appellant.
William L. Cahn, for respondent.

O'BRIEN, J.—The plaintiff brings this action as trustee in bankruptcy to set aside transfers made to the directors of the bankrupt corporation, on the ground that they were without consideration and were made at a time when the corporation was insolvent. The defendant made a motion for security for costs, which was denied, and from the order so entered he has appealed.

The question thus presented is whether, under the construction to be given to section 3268 of the Code of Civil Procedure, the defendant is entitled as matter of right to an order requiring the plaintiff to give security for costs. It appears that the alleged cause of action arose prior to the assignment or adjudication in bankruptcy or the appointment of the plaintiff as trustee, and the Special Term, relying no doubt upon what was said by this court in the case of *Joseph v. Makley* (73 App. Div. 157), and assuming, therefore, that the granting of security for costs was discretionary, denied the application.

In the *Makley* case (*supra*) the Special Term had denied the application upon the ground of want of power, and the question presented was as to whether that order was right; and we held that the court had power, and sent the motion back to the Special Term so that the judge there might have the opportunity to examine into the facts and determine the application on the merits. In discussing the construction to be given to section 3268 of the Code of Civil Procedure, however, we fell into error in stating that the granting of security for costs is discretionary, it being apparent from a re-examination of that section that it is mandatory, and that with respect

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to causes of action arising prior to the adjudication in bankruptcy, the defendant, assuming he is not guilty of laches, is entitled as matter of right to security for costs.

The discussion in the Makley case (*supra*) was unnecessary to our decision, which in itself was right. But the discussion whether necessary or not was wrong so far as it was therein stated that applications under section 3268 of the Code were addressed to the discretion of the court. Where the application is made under section 3271, there it is discretionary, while, as we have said, in cases falling under section 3268 it is mandatory on the court where the application is properly and seasonably presented.

The distinction between sections 3268 and 3271 of the Code of Civil Procedure has been clearly stated in *Welch v. Gaffney* (1 How. Pr., N. S. 146) as follows: Where an official assignee of a debtor sues upon a cause of action arising 'before the assignment,' he may be required by the defendant as of right to give security for costs (Code, sec. 3268). Where the cause of action comes to the assignee 'subsequent to the assignment,' it is discretionary with the court whether it will require the plaintiff to give security or not (Code, sec. 3271). This is the feature which distinguishes these two sections. If, for example, the defendant had bought the goods from the assignee 'subsequent' to the assignment, or if he had taken property from the assignee's possession, the case would have been brought under the provisions of section 3271 (*supra*). In the present instance the cause arose prior to the assignment, and the assignee must give security for costs." This distinction also was recognized by this court in the case of *Reilly v. Rosenberg* (57 App. Div. 408) and *Kelley v. Kremer* (74 App. Div. 456).

The present application, therefore, falling, as it does, within section 3268 of the Code of Civil Procedure, should have been granted, as the defendant was entitled as matter of right to have the plaintiff file security for costs. It follows that the

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order appealed from must be reversed, with \$10 costs and disbursements, and the motion granted.

All concur.

NOTE.—SECURITY FOR COSTS IN CERTAIN CASES DISCRETIONARY.

Section 3271 of the Code of Civil Procedure enumerates a class of plaintiffs whom "the court may in its discretion" require to give security for costs. *Ryan, as adm., v. Potter*, 4 Civil Pro. 80, see note; *Dunne v. Am. Surety Co.*, 29 Civil Pro. 59; *Wassinger, as adm., v. Fennell*, 13 Civil Pro. 286; *Ridgway, as recv., v. Symons*, 25 Civil Pro. 23; see also note page 24; *Lyons, as admx., v. Cahill*, 12 Civil Pro. 72; *Healy v. Twenty-third St. R. Co.*, 1 Civil Pro. 15, see note. It may be required in such cases on appeal. *Knoch v. Funke*, 22 Civil Pro. 161; *Wood v. Blodgett*, 15 Civil Pro. 114; *Gifford, as recv., v. Rising*, 14 Civil Pro. 172.

Where the suit is brought by plaintiff in a dual capacity, he cannot be required to give it. *McDougal v. Gray*, 15 Civil Pro. 237.

But a person suing in the name of overseers of the poor cannot be required to give security for costs. *In re Martin*, 7 Civil Pro. 399.

Where an action is brought in the lifetime of a plaintiff, upon it being revived his administrator will not be required to give security for costs. *Sullivan v. Remington*, 2 Civil Pro. 68.

Where a plaintiff is trustee of an express trust when one of the beneficiaries is a non-resident of the State and the other is an infant whose guardian *ad litem* has not filed such security, he will be required to file security for costs. *Fish v. Wing*, 1 Civil Pro. 231; see also note.

HOW GRANTED.

Such an order may be granted *ex parte*. *Dunne v. Am. Surety Co.*, 29 Civil Pro. 59; per contra, see *Swift v. Wheeler*, 13 Civil Pro. 343; and the court is not justified in exercising such discretion upon an *ex parte* application made after service of answer. *Kelley v. Kremer*, 74 App. Div. 456.

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ASCH, ETC.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPART-
MENT—NOVEMBER, 1902.

§ 2348.

*Application to be Relieved from Purchase at Judicial Sale Denied—
Sale in One Proceeding Under Sections 85 and 87, Real Prop-
erty Law, and Section 2348 Code Civil Procedure.*

The will of A left a parcel of real estate in the City of New York to his wife, for life, and upon her death to trustees to hold the premises upon several distinct trusts, for the benefit of those children of the testator who survived their mother, and further provided that on the termination of the minority of any child, or upon the death of any child during minority, the trust for that child should absolutely cease and determine; that each of the children of the testator living at the death of the mother should take a vested estate in remainder, expectant upon the termination of the trust at majority, and that in the event of the death of any child before attaining majority the share or portion held for the benefit of such child should be freed from the trust, and should pass absolutely to his or her heirs or devisees. In October, 1896, a joint application was made by the trustees under the will and by the guardian of the infant remaindermen, for the sale of the said premises, including the estate of the trustees and of the infants therein. An order was thereafter made directing a sale, and a deed was tendered to the purchaser which was signed not only by the special guardian and the trustees, but also by the widow as the owner of the life estate, and by a child of the testator who had attained his majority during the pendency of the proceeding. Upon an application made by the purchaser to be relieved from his purchase, Held:

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- I. That the fact that the infants' legal estates were contingent remainders in fee did not prevent the court from exercising its jurisdiction to decree a sale thereof.
- II. That such sale was not prohibited by section 2357 of the Code of Civil Procedure, which provides that the real property of an infant "shall not be sold, leased or mortgaged, as prescribed in this title, contrary to the provisions of a will by which it was devised, or of a conveyance or other instrument by which it was transferred to an infant or incompetent person."
- III. That the prohibition referred to in section 2357 is a prohibition expressed or fairly implied in the language of the will, and that there was no such prohibition here.
- IV. That under the statute of Uses and Trusts, as the same was in force when this proceeding was begun (Laws 1896, chap. 547, sec. 85), the court was empowered, whenever the interest of a trust estate in any real property was an undivided part or share thereof, to direct the sale of the same if it appeared to be for the best interest of such estate, and that the trust estate created by this will was an undivided part of the real estate within the meaning of said statute.
- V. That the fact that the trust estates were future and contingent did not render them incapable of sale by order of the court; nor was it any objection to said sale that they might never vest in possession.
- VI. That if all the children of the testator died before their mother, their interest would still pass to the purchaser, for in that event there would be intestacy as to the remainders, and the children would take as heirs at law. It is not an objection to such a construction of the will that the estate of the children as such heirs could never vest in possession, but depends for its actual enjoyment upon their own death before the life tenant; nor is it an objection that the same persons who would take as heirs at law are given another interest under the will.
- VII. That the rights of unborn children are represented by the persons from whom they would take by descent, such persons being parties to the proceeding, and that the interests of all are protected by the provisions of the order directing the investment of the proceeds of the sale.
- VIII. That the provisions of Laws of 1897 (chap. 136), amending section 87 of the Real Property Law, have no application to proceedings pending at the date of the passage of the amendment.

(Decided November, 1902.)

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Appeal by purchaser at a judicial sale from order denying ~~motion~~ to be relieved from purchase.

Geo. E. Corey, for appellant.

Benjamin N. Cardozo, for respondent.

PATTERSON, J.—John J. Danahar, the appellant, a purchaser at a judicial sale of real estate, applied to the court to be relieved from his purchase, alleging that there could not be conveyed to him a good title to the premises purchased, for the reason that the proceeding in which the sale was ordered was ineffectual to transfer such a title and that the court had no power to dispose of the interests in the land, as those interests existed when the proceeding was begun and when the order directing the sale was entered. That proceeding was a joint application of trustees under a will, and of the guardian of infant remaindermen, for the sale of a piece of real estate situate in the City of New York and known as 308 West Fifty-sixth street. The property belonged to Simon A. Asch, who died seized of it and left a last will and testament which was duly admitted to probate and which contained the following clause: "To my dear wife, Sarah, daughter of Emanuel Stern, during her lifetime, the house No. 308 West Fifty-sixth street, in which we are at present living, together with the income from my half share in the houses 230, 232, 320, 322, 324, 326, 328, 330 East Seventy-second street, and No. 329 West Forty-eighth street and 434 West Twenty-seventh street. This income to be paid to her in installments, at least once every three months, or oftener if convenient. At her death the whole of the above-named property to be kept in trust for our children then living, and to be divided in equal shares amongst them on their reaching their twenty-first birthday."

That clause of the will was the subject of judicial construction in a properly constituted action to which all persons then in interest were made parties, and the decree therein adjudged the rights of those parties in and to the premises.

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It was determined that Sarah Asch, the widow of the testator, had a vested life estate in the premises 308 West Fifty-sixth street; that on her death, the trustees would hold the premises upon several distinct trusts for the benefit of those children of the testator who survived their mother; that on the termination of the minority of any child or upon the death of any child during minority the trust for that child would absolutely cease and determine, and that each of the children of the testator who may be living at the death of the mother would take a vested estate in remainder, expectant upon the termination of the trust at majority; that in the event of the death of any child before attaining majority, the share or portion held for the benefit of such child would be freed from the trust and the same would pass absolutely to his or her heirs or devisees; and further, that the trusts and remainders limited thereon did not cause an unlawful suspension of the power of alienation and that the same were in all respects valid and effectual. This decree settled the rights of all the parties, with the exception that it was not expressly determined who would be entitled to the property in case of the death of all the children before their mother, in which event the trust estate would not arise.

The application for the sale of the land, so far as the trust interest was concerned, was made under sections 85 and 87 of the Real Property Law, and of the legal estates in remainder, under the provisions of section 2348 of the Code of Civil Procedure. We do not understand that objection is taken to the form in which the applications were made, namely, the combination of the two in one proceeding. Nor do we understand that the appellant now contends that a proper case was not made for a sale of the real estate. The order confirming the sale recites that the appellant stipulated that no question would be raised by him as to the sufficiency of the grounds stated in the papers to justify the court in finding that the interests of the parties will be promoted by a sale; and we do not understand that that recital is questioned or

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the stipulation repudiated. In any event, that matter was inquired into in the proceeding at Special Term and it was there shown that "peculiar reasons" or "peculiar circumstances" existed which were sufficient to authorize a sale of the infants' interests under subdivision 2 of section 2348 of the Code of Civil Procedure. In the proceeding an order was entered appointing a referee to report the facts and he reported that "the facts as set forth in the petition" were true, and that the interests of the infants and the trust estate would be promoted by a sale of the property for the sum of \$18,000—after which an order was entered confirming the referee's report and directing that the premises be sold, including the estates both of the trustees and of the infants and authorizing a special guardian of the infants to contract for a sale of the premises for a sum not less than \$18,000. The order also contained a provision that the guardian report under oath the terms and conditions made by him for the sale of the premises, and that, if required by the purchaser, Sarah Asch, individually, and as executrix and trustee, and Edward Isaacs, as executor and trustee, should join with the special guardian in a deed of the premises. That order was entered on the 26th of March, 1897. In January, 1902, the special guardian reported to the court that a contract had been made by him with Danahar for a sale of the premises for the sum of \$18,250. That agreement or contract of sale was made between Sarah Asch, individually and as trustee under the last will and testament of Simon A. Asch, deceased, Edward Isaacs, as trustee under said last will and testament, Edgar Asch, individually (he being one of the children of the testator who had attained his majority at the time the contract was made and as to whom the trust had terminated), Herman A. Hyde, as guardian *ad litem* for four infant children of the testator, and Danahar. By this agreement Danahar contracted to buy, not only the estate of the trustees and the remainders of the children, but also the life estate of Sarah Asch and the vested remainder of Edgar Asch. The

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contract is for the purchase of the premises No. 308 West Fifty-sixth street, subject to its confirmation and approval by the Supreme Court. Danahar agreed to purchase the whole premises at the consideration of \$18,250 to be paid in a certain way, and the parties of the first part, at their own proper cost and expense, agreed to execute, acknowledge and deliver to Danahar, or his assigns, a proper deed for conveying and assuring to him or them *the fee simple* of the said premises free from all incumbrances.

It is evident from this contract of sale that Danahar, the purchaser, expected and was entitled to acquire the fee of the premises—that is, the whole estate, and that was the contract approved by the court. He was to acquire the life estate of the widow and the vested remainder in fee of Edgar, the adult child, by contract with them, and the trust estate and the legal interests in remainder of the infant children, through the action of the court, to be evidenced by its order confirming the contract. Such an order was duly made on the 28th of January, 1902. It recites that a sale of the premises had been directed by the court subject to its approval; that it had been made to appear that a contract had been entered into and that the interests of the trust estate and the interest of the infants would be substantially promoted by such sale “for divers peculiar reasons and by virtue of divers peculiar circumstances,” and then proceeds to direct that such contract for the sale of the property No. 308 West Fifty-sixth street to the said John J. Danahar for the sum of \$18,250 “be and the same hereby is ratified and approved.”

In attempted performance of the contract, a deed was tendered to the purchaser by which Sarah Asch, individually, and as trustee under the last will and testament of Simon A. Asch, deceased, Edward A. Isaacs, trustee under the last will and testament of Simon A. Asch, deceased, Edgar Asch, individually, and Herman A. Hyde, as guardian of the four infant children, conveyed to the purchaser, Danahar, the

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premises in question. No objection seems to be taken to the form of this deed or to its provisions or its covenants.

It must be borne in mind that the case presented here is not that of a casual purchaser of real property at a public judicial sale, but that of a person seeking to be relieved from a *specific* contract deliberately made under his hand and seal, the terms and conditions of which are all definitely stated in that contract. Under its terms, as we have seen, the plaintiff was entitled to a conveyance which would vest in him the whole fee. That fee consists of the combined life estate, trust estate (whatever it may be), and the legal interests in remainder. The appellant elected to have the life tenant join in the conveyance by purchasing that life interest under the contract. He also agreed to take the vested interests in remainder of the adult child of the testator. The question then remains as to whether he would acquire under that deed the trust estate and the infants' legal estates in remainder. That such infants' legal estates are contingent remainders in fee does not prevent the court exercising its jurisdiction to direct a sale of such interests (*Dodge v. Stevens*, 105 N. Y. 585).

It is contended, however, that a sale of the infants' interests was prohibited by section 2357 of the Code of Civil Procedure, which provides that the real property of an infant, lunatic, idiot or habitual drunkard "shall not be sold, leased or mortgaged as prescribed in this title, contrary to the provisions of a will by which it was devised, or of a conveyance or other instrument by which it was transferred to an infant or incompetent person." It is further contended that the property could not be sold because of the inalienable character of the trust estate.

The provision of the testator's will does not expressly prohibit the sale of the premises in question here, nor are we able to see that a present sale of the property would defeat the testator's design. The direction that after the death of the widow, the real estate shall be *kept* "in trust for the benefit of our children then living," is to be construed as meaning

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that it shall be *held* in trust. We do not find in the clause of the will under consideration any fair implication that a sale of the property would be contrary to the provisions of the will. The only implication of a prohibition of a sale of the infants' interests that can be drawn must be from the interposition of a trust estate during their minority. But a trust estate (in a proper case) may also be sold by direction of the court, and where that may be done it cannot be said that the existence of the trust gives rise to an implication *drawn from a will* that a sale of the property is prohibited by the will. If there had been a sale of the trust estate separately, made under direction of the court, as is permitted by statute, could it be said in a subsequent separate proceeding under the Code for a sale of the infants' remainders, that such a sale would be in violation of a prohibition contained in the will? Here the sales of the trust estate and of the interests in remainder are concurrent, but that does not essentially change the situation.

We do not agree with the court at Special Term that the trust estate could not be presently sold, for a reason which will be hereinafter adverted to. While a voluntary sale of that trust estate would not be permitted, the Statute of Uses and Trusts now authorizes it to be sold in a proper case. *O'Donohue v. Boies* (159 N. Y. 87) is cited in support of the proposition that a sale ordered by the court of real property in contravention of a trust is forbidden by the statute and void. In that case we are referred to the words of Judge O'Brien in the opinion of the court that "the plain purpose of the enactment was to make these trust estates and trust interests indestructible and absolutely inalienable during the existence of the trust, and if they could be rendered alienable by the order of the court the whole scheme of the statute would be greatly impaired and its purpose thwarted." But an examination of that case will show that there was an express prohibition upon a sale during the continuance of the trust, and the sale was made in 1870, long before the Statute of

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Uses and Trusts was so amended as to permit the sale of trust estates by order of the court. In the Statute of Uses and Trusts, as it now reads (Laws 1896, chap. 547, sec. 85), it is provided that "if the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, *except as provided in this section*, shall be absolutely void. The Supreme Court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that it is for the *best interest* of such estate or that it is necessary and for the benefit of the estate to raise funds for the purpose of preserving and improving it; and *whenever* the interest of the trust estate in any real property is *an undivided part* or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate." That provision is substantially the same as the amendment of 1866 of section 65 of the Statute of Uses and Trusts under the Revised Statutes (Laws of 1886, chap. 237), except that part relating to sale where the trust is of an undivided part or share of real estate.

The authority to direct the sale of the trust estate is to be looked for and is found in the statutes, and the authority conferred is abundant, the reason assigned for ordering such sale in this case being sufficient, and, as was said before, not open to contest on this appeal. Here the trust estate consists or will consist of *an undivided part* of the real estate, for it never can attach to the interest of Edgar Asch.

It is contended that the trust estate could not be sold because there is no trust estate in fact, and, therefore, nothing to sell. The learned justice at Special Term took that view and remarked in his opinion that, inasmuch as no estate can vest in the trustees until the death of the widow, and even then only in the event of such death during the minority of some of the children, there was no present estate in the trustees and nothing which may be made the subject of a sale by them;

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and, therefore, he concluded that a sale of the infants' property was in no way dependent upon getting in a trustee's title, and that a conveyance of the remainders of the children and of the life estate of the widow and of the interest of Edgar Asch would be sufficient to confer upon the purchaser full title. But the trust provision in the testator's will cannot thus be summarily disposed of. While there is no present right of possession in the trustees and the trust estate is future and contingent, nevertheless there does exist such an interest in the trustees as would incumber the purchaser's title unless that interest were lawfully extinguished or transferred to the proceeds of a sale of the land.

We do not think the nature and character of the trustees' interest is such that it was incapable of being sold by order of the court. Contingent future estates in land are vendable and alienable. It is no objection to their sale that they may never vest in possession. There is no limitation contained in the statute upon the power of the court to direct a sale of such a trust interest. The power is conferred when its exercise is necessary to the protection or for the best interests of the estate. Here, the proceeds of sale would stand in the place of the real estate, and the trust would be transferred and attach to those proceeds. Upon the death of the widow, infant children of the testator surviving her, the trustees' right would instantly attach to the fund representing these infants' interests.

The appellant has not called our attention, either upon the oral argument or upon his brief, to any other objection affecting the substantial questions arising under the will of Mr. Asch; but it may be well to state that we have not failed to consider what would be the effect upon the title if any child of the testator should die before the life tenant. By the provision of the will, it is only those children who shall be living at the time of the death of the life tenant who take in remainder. The interest of a child dying during minority and before the mother, would pass to the other children. All the

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children are parties to the proceeding, and every interest they can have would be acquired by the purchaser; but if all the children should die before their mother, still their interest would pass to the purchaser, for in that event there would be intestacy as to the remainders, and the children would take as heirs at law. As we have remarked before, that is unprovided for in the will. If it happens, a contingent estate would pass to the heirs at law as of the time of the testator's death. We agree with the learned counsel for the respondent that it is not an objection that their estate as such heirs could never vest in possession, but depends for its actual enjoyment upon their own death before the life tenant. Nor is it an objection that the same persons who would take as heirs at law are given another interest under the will. Authority for that proposition is found in *Doane v. Mercantile Trust Co.* (160 N. Y. 494) and the cases there cited. Nor is it an objection that unborn grandchildren of the testator might hereafter become interested in the property. The rights of unborn children are represented by the persons from whom they would take by descent, such persons being parties to this proceeding (*Kent v. Church of St. Michael*, 136 N. Y. 10, and cases cited). The interests of all who are or may become entitled to any of the proceeds of sale are protected by the provision of the order directing a conveyance which requires that the special guardian report under oath to the court the disposition and investment of the proceeds, and that annual accounts be rendered thereafter by him of the distribution and investment of such proceeds which remain in his hands, until the termination of the life estate and the trusts.

The claim that there are defects in the procedure which tend to invalidate it is not sustainable. It is said that the trustees were not required by the order of the court to execute the deed; but, as we have stated, the purchaser by his own contract disposed of that matter. The order directed that if the purchaser required the trustees to execute the deed, they should do so; and he did so require. Nor was it necessary for

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the trustees to report the sale to the court under oath. That requirement is contained in the amendment of section 87 of the Real Property Law by the Statute of 1897, chapter 136, and we do not think it applied to this proceeding, which was instituted before that amendment was passed. It appears, however, that, in fact, Mrs. Asch, one of the trustees, stated in an affidavit presented to the court that she had read the affidavit of the special guardian which set forth the contract *in extenso* and that the proposed sale met with her approval. We are also of the opinion that this proceeding was not affected by the amendment of 1897, and that the procedure therein directed, and the provisions under which trustees may become authorized to sell interests in remainder as well as the trust estate, do not apply to this proceeding, which, at the time it was begun, was properly instituted under the law as it then stood. The amendment of 1897 not only changes procedure, but it gives to the trustees power to sell estates in remainder, which they never had before that amendment was passed, and we think its scope should be confined to cases arising after its passage.

The order appealed from should be affirmed, with costs.

INGRAHAM, HATCH and LAUGHLIN, JJ., concur; VAN BRUNT, P.J., concurs in result.

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JOHN VERRA, PLAINTIFF, v. DOMENICO COSTANTINO AND ANTHONY PERUSO, DEFENDANTS.

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF
MANHATTAN—SECOND DISTRICT—NOVEMBER, 1902.

§ 1733.

*Action on Undertaking in Replevin—Plaintiff Permitted to Recover
Damages Though Replevin Suit Had been Abandoned.*

Where it appeared that the plaintiff, for any reason, does not continue his replevin action he is guilty of a breach of the condition of the replevin bond and liable for damages on the undertaking.
(Decided November, 1902.)

Cohen Brothers, attorneys for plaintiff.

Sullivan, Goldsmith & Engel, attorneys for defendants.

RASQUIN, J.—This action is brought to recover damages on an undertaking by the defendants in an action in replevin brought by John Graziuso against Raffaello Baltinetti in the Municipal Court, Ninth District, in which the property was taken, as appears by the marshal's return and from the evidence of the plaintiff and his assignor Baltinetti, who had assigned his claim to the plaintiff.

The answer interposed by the defendants is to the effect that no final judgment having been rendered in that action, the plaintiff cannot recover. It is conceded by the defendants that the action in the Ninth District Court was instituted; that a writ of replevin was issued; that a marshal of the City of New York replevied the articles mentioned in the affidavit; that no trial fee was paid, and that the case

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never appeared on the calendar for the joinder of issue or for trial, and therefore abated.

Section 1733 of the Code of Civil Procedure, which is identical with section 126 of the Municipal Court Act, provides that "a plaintiff who has recovered a final judgment cannot maintain an action against the sureties in an undertaking given in behalf of the defendants to procure a return of the chattel, or against the bail of a defendant who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor, for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant who has recovered a final judgment cannot maintain an action against sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return of similar execution against the plaintiff."

If the contention of the defendant be good, then the complaint must be dismissed. I think, however, that it is untenable, especially when we consider what irreparable injury would be worked if such a doctrine were upheld.

Under the well-settled practice of this court and by the provisions of the Municipal Court Act the plaintiff may, before final submission, withdraw and discontinue the action; or, as in this case, he may fail to pay the required fee and place the case upon the calendar, or the court may lose jurisdiction. In either event, where would the remedy of the defendant on the undertaking be? Certainly he could get no final judgment, for the reason that the court was without jurisdiction to grant it. It would work an abatement and so bring the case within *Tone v. Hetherington* (Daily Register, October 7, 1881); *Frost v. Kopp* (13 Civ. Pro. R. 377). The section clearly applies in an action in replevin; where either party has obtained a judgment, he must first issue execution on the judgment before he can proceed on the undertaking. In other words, the law has provided that

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where the action has been disposed of on the merits between the parties, recourse must first be exhausted against the other, in that action, before an action can be maintained on an undertaking. The defendant, being unable to obtain final judgment in such a case, would, if the contention of the defendant is good, be without remedy.

It might be argued that the defendant has a right on the return day to present a copy of the papers to the trial justice, and have the case marked dismissed, under section 248 of the Municipal Court Act.

That section provides: "Judgment that the action be dismissed with costs, without prejudice to a new action, shall be rendered in the following cases:

"1. Where the plaintiff voluntarily discontinues the action before it is finally submitted.

"2. When he fails to appear at the time specified in the summons or upon adjournment."

This certainly would not be a final judgment, for it would not determine the rights of the parties, as it would be without prejudice to a new action, and the defendants could, under such circumstances, advance the same defense as now.

I think the case at bar is identical with that of *Tyler v. Millen* (8 Week. Dig. 290). In that case the defendant brought an action in replevin in a justice's court against one Howland, to obtain possession of a horse, who gave an undertaking for the prosecution of the action, or the return of the property, if adjudged to belong to the defendant. After the joining of issue and on the day fixed for trial, plaintiff withdrew the action, defendant protesting, and judgment of discontinuance was entered. Howland assigned his claim to plaintiffs, and in an action brought on an undertaking, judgment was rendered in favor of plaintiffs. On appeal to the General Term, Third Department, it was held "that when Millen discontinued the action, he was guilty of a breach of the condition of his bond, and became liable for damages. His conduct was an attempt to pervert the

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law by gaining possession of the horse and stopping proceedings in time to retain such possession and thus compel the defendant to revive the action on his own behalf.

"The recovery is just and proper. Millen's affidavit before the justice was introduced in evidence in this action over objection. His admission of the value of the horse was proof, and is sufficient evidence of value."

I think the doctrine laid down in the Tyler case is sound and controlling, and I shall follow it. No evidence was introduced on behalf of the defendant to offset plaintiff's evidence as to damages, and I think, under the authorities cited, plaintiff is entitled to judgment for \$150 and costs.

Let judgment be entered accordingly.

**IN THE MATTER OF THE APPLICATION OF ELGIN
R. L. GOULD, COUNTY TREASURER, FOR AN
ORDER EXAMINING KOSSUTH-MARX JEWELRY
COMPANY, LIMITED, IN SUPPLEMENTARY PRO-
CEEDINGS FOR THE COLLECTION OF A TAX.**

**SUPREME COURT—APPELLATE DIVISION—FIRST DEPART-
MENT—NOVEMBER, 1902.**

§ 754.

Supplementary Proceedings—Collection of Taxes.

Section 259 of the Tax Law which authorizes supplementary proceedings for the collection of a tax exceeding \$10 in amount levied against a person or corporation and returned uncollected for want of personal property out of which to collect it, is applicable to taxes levied in the County of New York, and the City Chamberlain, acting as the City Treasurer of the County of New York, may institute such proceedings.

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The fact that the charter of Greater New York contains provisions for the collection of personal taxes by distress and sale and by action is no indication that the general law authorizing supplementary proceedings is not also applicable, and the remedy by action is not inconsistent with the existence of the remedy by supplementary proceedings.

(Decided November, 1902.)

Appeal by Kossuth-Marx Jewelry Company, Limited, from an order of the Special Term of the Supreme Court, entered in the clerk's office of the County of New York, on the 11th day of September, 1902, denying its motion to set aside an order made on the 4th day of August, 1902, requiring the appellant to appear and be examined concerning its property, and enjoining it from transferring or interfering with its property not exempt from execution until the further order of the court.

A. S. Gilbert, for appellant.

Martin Saxe and *H. M. Powell*, for respondent.

LAUGHLIN, J.—The question presented by this appeal is whether section 259 of the Tax Law, which authorizes supplementary proceedings for the collection of a tax exceeding \$10 in amount levied against a person or corporation and returned uncollected for want of personal property out of which to collect it, is applicable to taxes levied in the County of New York. The provisions of this section, so far as material to the determination of the question, are as follows:

"If a tax exceeding \$10 in amount levied against a person or corporation is returned by the proper collector uncollected for want of personal property out of which to collect the same, the supervisor of the town or ward, or the county treasurer or president of the village, if it is a village tax, may, within one year thereafter, apply to the court for the institution of proceedings supplementary to execution, as upon a judgment docketed in such county for the purpose of

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collecting such tax and fees, with interest thereon from the 15th day of February after the levy thereof."

The application for the order was made in due form by the Chamberlain of the City of New York, claiming to act as county treasurer. The appellant contends that the remedies prescribed in the Charter of Greater New York for the collection of personal taxes are exclusive, and that the general law is inapplicable. The tax, amounting to \$1,005, was duly levied for the year 1898, and a warrant for its collection was duly issued by the receiver of taxes to one of the marshals, who, on September 1, 1901, returned the warrant uncollected for want of personal property out of which to collect the same.

At the time this tax was levied, and now, the General Tax Law provided two remedies for the collection of personal taxes, viz: (1) distress and sale by the collector (sec. 71, Tax Law); and (2) supplementary proceedings under section 259 herein quoted; and the Charter of Greater New York prescribed three remedies, viz: (1) distress and sale by the marshal; (2) an action by the receiver of taxes in the name of the city for its collection on and after the 15th day of January of the year succeeding that in which the tax was imposed; and (3) by a proceeding in the nature of a contempt proceeding, whereby on the application of the receiver of taxes to be made within one year after the return and showing that he has reason to believe that the person taxed has "debts, credits, choses in action or other personal property not taxed elsewhere in this State and upon which the levy cannot be made according to law," the Supreme Court was authorized to impose a fine sufficient to pay the tax, the expenses of the proceeding and \$10 costs (secs. 926 to 936 inclusive, Charter of Greater New York). Prior to the year 1842 the method of collecting personal taxes was prescribed by the Revised Statutes, part 1, title 3, chapter 13, and was limited to distress and sale. In that year the Legislature enacted a general law prescribing an

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additional remedy by contempt proceedings and made the provisions of the Revised Statutes with reference to proceedings for contempt, both by order to show cause and by judgment, applicable (chap. 318, Laws of 1842; title 13, chap. 8, part 3, R. S.). The first local law to which our attention has been directed regulating the collection of either real or personal taxes is chapter 230 of the Laws of 1843, which related to taxes levied in the City of New York. It was, in effect, a re-enactment of the provisions of the Revised Statutes with reference to the collection by distress and sale and which it expressly declared should not be applicable to the City of New York. It also provided for an application to the court to enforce payment of taxes by the imposition of a fine upon the delinquent without expressly prescribing the procedure or expressly making the provisions of the Revised Statutes relating to contempt proceedings applicable, as had been done in the General Law.

It was evidently intended that the provisions of the general law on this subject, to which reference has been made, should be followed, for they were not expressly declared inapplicable, and without them the procedure was incomplete. So far as material to our inquiry, both the general and local law remained in this condition until 1867. By chapter 334 of the laws of that year, the Legislature created in the department of finance a bureau for the collection of personal taxes, and authorized the court to dismiss a proceeding instituted for the collection of a tax by fine, upon its appearing that the delinquent was unable to pay the tax. This law also gave a further remedy by action similar to that now contained in the charter. At the same session the Legislature enacted the first law authorizing supplementary proceedings for the collection of personal taxes (chap. 361, Laws of 1867). This is entitled "An Act Authorizing Supplementary Proceedings for the Collection of Taxes." It provided that when a tax exceeding ten dollars, levied by any board of supervisors against a resident of the county, was

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returned "by a collector to the county treasurer uncollected," the supervisor of the town or county treasurer might, within one year thereafter, institute proceedings in the County Court for the collection thereof similar to proceedings supplementary to execution upon a judgment. At that time, and down to 1874, taxes in this city were levied by a board of supervisors (chap. 302, Laws of 1859; Revised Statutes, part 1, chap. 13, title 2, secs. 31-39; chap. 304, Laws of 1874). It refers to taxes "returned by a collector to the county treasurer." At this time the Chamberlain of the City of New York was declared to be the County Treasurer of the County of New York (Rev. Stat., part 1, chap. 12, title 2, sec. 29); but the title of the official who collected the taxes was *receiver*, not collector (chap. 230, Laws of 1843), and the returns of uncollected taxes were made to the *bureau for the collection of unpaid personal taxes, and not to the chamberlain as county treasurer* (chap. 334, Laws of 1867, sec. 3).

It is unnecessary to decide whether the Legislature intended that this general law should be applicable to the City of New York; and, if so, whether on account of these imperfections it could be given effect. There was no further material change in the general or local laws on this subject until the enactment of the Tax Law in 1896, except that the section of the Revised Statutes to which reference has been made declaring the chamberlain the county treasurer was repealed by the County Law in 1892. The Consolidation Act, however, providing for a salary for the chamberlain (as county treasurer) continued in force and was re-enacted in the Greater New York charter (sec. 165 of the Consolidation Act, chap. 410, Laws of 1882).

The chamberlain is also deemed the county treasurer for the purpose of receiving court funds (Code Civ. Pro., sec. 754). It thus appears that the chamberlain, who has instituted this proceeding, has been for many purposes declared the county treasurer. It is further significant that the

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Legislature did not confine the applications for orders supplementary exclusively to county treasurers. It will also be observed that while the first act authorizing supplementary proceedings for the collection of taxes (chap. 361, Laws of 1867) expressly related to taxes "returned by the collector to the county treasurer," the present law authorizing the institution of supplementary proceedings by county treasurers is unqualified by any provision requiring that the return of the uncollected taxes shall be made to him.

The powers formerly exercised by the board of supervisors in levying taxes in this city are now exercised by the board of aldermen (sec. 910, Greater New York charter). Section 259 of the Tax Law as now framed is in harmony with that statute relating to taxes levied by a board of aldermen for the limitation contained in the original statute of 1867, which first authorized supplementary proceedings, confining them to taxes levied by the board of supervisors, has been omitted. It will be seen that this section relates to any tax and makes no reference to the board or body which levied the tax. The contempt proceedings for the collection of taxes throughout the State generally were repealed and not continued by the Tax Law; but they remained in the city charter (secs. 930 and 931, Greater New York charter), and were expressly repealed by chapter 466 of the Laws of 1901. Prior to this time, however, the Legislature had declared against the policy of enforcing taxes by fine and imprisonment (chap. 766, Laws of 1897, amended by chap. 79, Laws of 1898). It is quite likely that the provisions of the charter were repealed by implication by the statutes last cited, for at that time, so far as we have discovered, there was no general law authorizing the enforcement of taxes by proceedings in the nature of contempt proceedings; and supplementary proceedings upon a judgment recovered for taxes were expressly excepted from these acts. This exception must have related to supplementary proceedings upon judgments for taxes recovered under local laws, for there was no general law

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authorizing such actions. It is also significant that when the Legislature expressly repealed sections 930 and 931 of the Greater New York charter, which authorized the collection of personal taxes by proceedings in the nature of contempt proceedings, sections 932, 933 and 934, relating to proceedings in court for the collection of taxes, and not necessarily confined to contempt proceedings, were not repealed, and still remain in the charter. The fact that the charter contains provisions for the collection of personal taxes by distress and sale and by actions, is no indication that the general law authorizing supplementary proceedings is not also applicable. The remedy by action is not inconsistent with the existence of the remedy by supplementary proceedings. It may well be that the Legislature regarded the remedy by supplementary proceedings as fairly adequate in other counties, but inadequate in the County of New York.

While supplementary proceedings are authorized upon the theory that the tax is in the nature of a judgment, yet the personal tax is not a lien upon property, and the remedy by supplementary proceedings would be entirely inadequate to reach property located elsewhere in the State. Proceedings supplementary would be required to be instituted in the county where the taxpayer resides. Very many persons are taxed here for personal property who subsequently change their residence to other parts of the State or to other States, and likewise a great number of non-residents of the State are taxed here. The remedy by action would authorize the attachment of property of non-resident taxpayers, and the judgment might be sued over in another jurisdiction where the taxpayer resides. It thus appears that the remedy by action might be necessary, even though the remedy by supplementary proceedings existed. The remedy by supplementary proceedings, however, on account of its summary character, would be more adequate and effectual in many cases if by the examination property were discovered within the jurisdiction of the court. Its transfer could be enjoined

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and it could be reached through a receiver and applied in payment of the tax.

It follows, therefore, that the provision of section 259 of the Tax Law is applicable to the City of New York, and the order from which the appeal is taken should be affirmed, with \$10 costs and disbursements.

All concur.

CHARLES E. WILLIS, APPELLANT, v. METROPOLITAN STREET RAILWAY COMPANY, RESPONDENT.

SUPREME COURT—APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT—NOVEMBER, 1902.

§ 723.

Negligence—Assault upon Passenger by the Conductor of a Street Car.

Where, upon the trial of an action, it appeared that the plaintiff, who had succeeded in getting upon the step of defendant's car, obtaining a solid footing, was struck in the neck by the conductor in charge thereof, and knocked to the pavement, where he struck upon the back of his head and sustained serious injuries, and the pleading sufficiently stated that the accident or injury to the plaintiff resulted from the negligent, careless or reckless conduct of the defendant's servant while engaged in the transaction of the master's business,—*Held*, that whether the action was one for negligence, or for assault, the liability of the defendant was the same, and the plaintiff was entitled to go to the jury upon the question thus presented.

(*Decided November, 1902.*)

Appeal from a judgment directed by the court at the close of plaintiff's case dismissing the complaint, and from an order denying a motion for a new trial.

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Thomas P. Wickes (Charles R. LaRue with him on the brief), for the appellant.

Theodore H. Lord (Charles F. Brown with him on the brief), for the respondent.

WOODWARD, J.—The plaintiff's complaint alleged: "The plaintiff lawfully attempted to board an east-bound car of the defendant upon Fourteenth street, at or near its intersection with Fourth avenue * * * and while so lawfully attempting to board the defendant's said car, the defendant's conductor in charge of said car, negligently, carelessly and recklessly interfered with said plaintiff, by reason whereof said plaintiff was thrown from said car into the street and severely injured." The evidence of the plaintiff tended to show that at about eight o'clock in the evening of July 28, 1900, the plaintiff, in company with one Kemp, who appears as a witness, was at the corner of Fourteenth street and Fourth avenue, waiting for an east-bound horse car, which was approaching on the southerly track on Fourteenth street; that the car stopped at the corner and three or four persons got off and one or more got on. The plaintiff started to get on, but was told by the conductor that there was no room, to go on away. The car started, and as the rear of the car passed the plaintiff, he saw that there was plenty of room on the car, and, as it was moving slowly, he ran after it twenty feet or more, grasped the handle on the body of the car with his right hand and the handle on the dashboard with his left, and sprang on to the step with both feet, obtaining a solid footing, and remained there as a passenger for a few seconds. While in this position the conductor said to him, "Didn't I tell you there was no room here?" and with his fist he struck plaintiff in the neck, knocking him from his position of safety upon the car step to the pavement, where he struck upon the back of his head, sustaining serious injuries. The learned court, under plaintiff's exception, excluded some testimony in reference to the conductor's striking the plaintiff; struck out

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other similar testimony as soon as it was given; struck out all the testimony of the witness Kemp tending to show an assault by the conductor, and finally dismissed the complaint on the ground that the complaint was for damages for negligence and that the proof sought to be introduced was for an assault. The plaintiff took an exception, and moved for a new trial, this motion being denied.

Under the provisions of section 723 of the Code of Civil Procedure, the court is admonished that "in every state of the action the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party, and where the amendment does not change substantially the claim or defense" the court is authorized to conform the pleading or other proceeding to the facts proved. The facts proved in this case, or at least the evidence from which the jury might reach this conclusion, were that the plaintiff had succeeded in getting on board of the defendant's car, with the intention of becoming a passenger, and whether the action was one for negligence or for an assault, the liability of the defendant was the same, and the pleading sufficiently stated that the accident or injury to the plaintiff resulted from the negligent, careless or reckless conduct of the defendant's servant while engaged in the transaction of the master's business, and the plaintiff was entitled to go to the jury upon the question thus presented. If the plaintiff was lawfully upon the defendant's car, with the intention of becoming a passenger, there was an implied contract on the part of the defendant to carry him safely, and an assault committed upon the plaintiff by the defendant's servant while in the discharge of the duty which the defendant owed to the plaintiff was in law a negligent act on the part of the defendant. "Negligence," say the court in *Nicholson v. Erie R'y* (41 N. Y. 525, 529), "consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty, to the injury of another" (*Splittorf v. State of N. Y.*, 108 N. Y. 205, 213). When the defendant per-

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mitted its servant to commit an assault upon the plaintiff, while a passenger, by which the latter was injured, it omitted a legal duty which it owed to the plaintiff, and was thus brought squarely within the rule above laid down. "It is conceded," say the court in *Stewart v. Brooklyn and Crosstown RR.* (90 N. Y. 590, 591), "that any injury arising from the mere negligence of the servant constitutes a breach of the contract. Had the driver, while executing the contract, carelessly and negligently injured the plaintiff, the defendant's liability would not have been doubted. Can it be less a breach of the contract that the injury was intentionally inflicted? An act which would amount to a breach of the carrier's contract if negligently done, would be equally a breach if done willfully and maliciously. It is immaterial whether a breach of contract results from the negligence or willfulness of the defendant's agent (*Weed v. Panama RR.*, 17 N. Y. 362). It is the injury that was suffered by the plaintiff while in the defendant's car, and not the motive which induced it, that constitutes the gist of the action. No reason exists for holding a master liable for the negligence of servants in his employment which does not with equal force preclude him from alleging intentional default of the servant as an excuse for not performing a duty which he has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter the act of the servant is the act of the master, the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. In the present case the master had undertaken to transport the plaintiff safely. He was injured while on the defendant's car by the act of the agent to whom the defendant had intrusted the execution of the contract. It is the defendant's failure to carry safely and without injury that constitutes the breach, and it is no defense to say that that failure was the result of the willful or malicious act of the servant."

In the case at bar the plaintiff has likewise pleaded that

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"the defendant's conductor in charge of said car was an incompetent, unfit and unsuitable person for the duties of street-car conductor, and the defendant knew, or should have known, of his incompetence, unfitness and unsuitability for the said position, and was negligent in employing and continuing to employ him in the said position of street-car conductor," and that the "accident happened solely through the negligence of the defendant and of its agents, servants and employees and without any negligence whatever on the part of the plaintiff." Clearly, if the jury believed the story told by the plaintiff there was evidence to show that the conductor was a brutal and unfit person to be in charge of a car, and under well-established rules, the company was liable for the injury sustained by the plaintiff. "A railway company selects its own agents at its own pleasure, and is bound to employ none except capable, prudent and humane men" (*Stewart v. Bklyn. and Crosstown R.R.*, 90 N. Y. 588, 593, and authorities there cited).

The rule is well settled that once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger (*Palmeri v. M. R. Co.*, 133 N. Y. 261, 265-6, and authorities there cited; *Hart v. Met. St. R'y*, 65 App. Div. 493, 495). The plaintiff having produced evidence showing that he had reached a place of safety upon defendant's car, and that he was knocked off and injured by the defendant's servant in charge of such car, he was entitled to go to the jury on the question of the negligence of the defendant in failing to safely carry him. The pleading may have been defective in technical language or in logical statement, but as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment (*Kain v. Larkin*, 141 N. Y. 144, 151). It cannot be doubted that the complaint did allege that the plaintiff was lawfully attempting to board the

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defendant's car, and that he had succeeded, for it is said that he was "thrown from said car into the street," and he could not have been thrown from the car unless he had accomplished his lawful effort to board the car. His evidence shows that he was upon the car, and the complaint should have been deemed to have been amended in accordance with the facts established for the purposes of the motion to dismiss.

The conclusion here reached is not in harmony with the case of *Block v. Third Avenue RR.* (60 App. Div. 191), although it is possible to distinguish the cases on the substance of the matters pleaded; but that case does not appear to have considered the question of the defendant's neglect to safely carry its passengers, or the authorities which are here cited upon this point. We believe the weight of authority holds that a passenger upon the cars of a common carrier is entitled to be safely transported, and that any act on the part of the defendant's servants in carrying out this contract, whether carelessly done or done with personal malice on the part of the servant, which results in injury to the plaintiff, must charge the carrier with liability, and that the cause of action, whether for the assault or for negligence, is properly maintainable against the carrier (*Stewart v. Bklyn. and Croestown RR.*, 90 N. Y. 588, 592-3, and authorities there cited; *Dwinelle v. N. Y. C. & H. R. RR.*, 120 N. Y. 117, 122; *McCann v. Sixth Avenue RR.*, 117 N. Y. 505, 510; *Palmeri v. M. R. Co.*, 133 N. Y. 261, 265; *Hart v. Met. St. R'y*, 65 App. Div. 493, 495, and authorities there cited; *Lake Shore, &c., Ry. v. Prentice*, 147 U. S. 101, 109, and authorities there cited; *Mulligan v. N. Y. & R. B. R. Co.*, 129 N. Y. 506, 512, citing the *Stewart* case, *supra*; *Magar v. Hammond*, 54 App. Div. 532, and authorities cited; *Nowack v. Met. St. Ry.*, 166 N. Y. 433, 440).

The judgment should be reversed and a new trial granted.
All concur.

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J. WARREN GREENE, RESPONDENT, v. CHARLES H. KNOX, WILLIAM N. DYKMAN AND ALEXANDER T. MASON, AS CIVIL SERVICE COMMISSIONERS OF THE CITY OF NEW YORK; BIRD S. COLER, AS COMPTROLLER OF THE CITY OF NEW YORK; MICHAEL C. MURPHY, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; EDWARD A. GAUS, JAMES GANNON AND JOHN J. LANTRY, APPELLANTS.

SUPREME COURT—APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT—NOVEMBER, 1902.

§§ 1925, 1948.

Action to have Appointment of Police Captains Declared Void—Taxpayer's Action under Section 1925, Code of Civil Procedure, Not Maintainable to Try Title to Office.

Where there is no allegation in the complaint that the appointment has or will result in "waste of or injury to the estate, funds or other property," the complaint does not state facts which would entitle a taxpayer to interfere.

The question of the title to the office is the one which is in fact involved. The appropriate remedy and an adequate one is by information in the nature of *quo warranto*.

(Decided November, 1902.)

Appeal from an interlocutory judgment overruling the demurrer of certain of the defendants.

William C. De Witt, for the appellant Gaus.

Abraham Elkus (Edward Dienst with him on the brief), for the appellants Gannon and Lantry.

Edward M. Shepard (A. W. Cooley and Samuel H. Ordway with him on the brief), for the respondent.

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WOODWARD, J.—The plaintiff brings this action as a taxpayer under the provisions of section 1925 of the Code of Civil Procedure against Charles H. Knox, William N. Dykman and Alexander T. Mason, as Civil Service Commissioners of the City of New York; Bird S. Coler, as Comptroller of the City of New York; Michael C. Murphy, as Police Commissioner of the City of New York; and Edward A. Gaus, James Gannon and John J. Lantry, as police captains,—and demands judgment that the “promotion and appointment of the defendants Edward A. Gaus, James Gannon and John J. Lantry, as Captains in the Police Department of the City of New York, and each of them be set aside and declared null and void,” and that the civil service commissioners named, as well as the police commissioners, be restrained from certifying the pay rolls for the three defendants above mentioned, and that the comptroller be enjoined and restrained from paying these three defendants their salaries as captains of police. Gaus, Gannon and Lantry, who are the real defendants, demur to the complaint upon the grounds that the plaintiff has not legal capacity to sue, in that no authority is by law conferred upon a taxpayer to bring and maintain an action of the character stated in the complaint; that the complaint does not state facts sufficient to constitute a cause of action, and that causes of action have been improperly united. The learned court as Special Term has overruled these demurrers, and from the interlocutory judgment entered appeal comes to this court.

We are of the opinion that the learned court erred in this disposition of the demurrers. There is no allegation in the complaint that the appointment of these three defendants, who were promoted from police sergeants to captains, has or will result in “waste of or injury to the estate, funds or other property of” the City of New York, and without such an allegation the complaint does not state facts which would entitle a taxpayer to interfere (*Johnston v. Garside*, 65 Hun, 208, 210). “Full force and effect can be given to the statute by

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confining it to a case where the acts complained of are without power, or where corruption, fraud, or bad faith amounting to fraud, is charged," say the court in *Talcott v. City of Buffalo* (125 N. Y. 280, 288). "Any other construction," continue the court, "would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of the taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local administration." The mere allegation of the pleader that "the City of New York and its citizens, including this plaintiff, are damaged thereby," does not state facts which would justify the inference that the payment of salaries to these defendants would constitute "waste of or injury to the estate, funds or other property" of the City of New York (*Melody v. Goodrich*, 67 App. Div. 368, 371), for it is not suggested that it was not lawful to promote and appoint to the positions held by them, and the only suggestion of corrupt or vicious conduct is that alleged to have been taken by the old police board in improperly rating the standing of these defendants in a civil service examination. There is no charge or suggestion that this action on the part of the police board was due to any fraud or collusion on the part of the defendants who are before this court, or that they knew of any such alleged misconduct on the part of the police board. So far as appears from the pleadings the defendants were among a number of police sergeants who underwent an examination for promotion to the positions of captain; they received markings which entitled them to certification upon the list of eligibles and they were duly appointed from such eligible lists, and have entered upon the discharge of the duties to which they have been appointed. This examination was conducted by the municipal civil service commission, and the only charge of conduct of a fraudulent nature is that the police board to whom the civil service commissioners applied for information as to the standing of the applicants, made returns which gave to these defendants an undue advantage

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in the examinations. There is no allegation that the civil service commissioners knew that these reports were false and untrue, or that they in any wise connived at such alleged untrue statements, or that these defendants were in any way involved in the alleged fraudulent transactions. Under these circumstances, we are unable to discover that the plaintiff, as a taxpayer, has pleaded a cause of action as against the demurring defendants. If the appointments were made without authority of law, or if the defendants had been guilty of bad faith amounting to fraud, there would be some reason for holding that a good cause of action was stated in the complaint; but in the absence of facts from which such an inference may be properly drawn, we fail to see what right a taxpayer has to maintain this action. The defendants are holding positions to which they have been appointed under the forms of law; they are holding office under color of right, and the question of the title to the office is the one which is, in fact, involved. The appropriate remedy, and an adequate one, is by information in the nature of *quo warranto* (Matter of Hart, 159 N. Y. 278, 286, and authority there cited), and the courts have long held to the doctrine that this was the only proper method of trying the title to an office (Johnston v. Garside, 65 Hun, 208, 211, and authorities there cited; People ex rel. Wren v. Goetting, 133 N. Y. 569, 570, and authorities there cited; People ex rel. Nicholl v. N. Y. I. Asylum, 122 N. Y. 190, 197, and authorities there cited; Stuber v. Coler, 164 N. Y. 22, 24; Matter of Brenner, 170 N. Y. 185, 193). The rule is laid down by Mechem in his work on Public Offices and Officers (cited with approval in People ex rel. Lewis v. Brush, 146 N. Y. 60, 63), that "the proceeding by *quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who is entitled to hold it; of obtaining possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid

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election or who illegally continues to hold it after the expiration of his term"; and section 1948 of the Code of Civil Procedure provides that "the attorney-general may maintain an action, upon his own information, or upon complaint of a private person * * * against a person who usurps, intrudes into, or unlawfully holds or exercises within the State, a franchise or a public office, civil or military, or an office in a domestic corporation." If the defendants now before this court have been legally inducted into office they are entitled to receive their compensation, and the facts alleged in the complaint not showing that any waste or injury to the estate, funds or other property of the City of New York is to follow the payment of such salaries, or that their appointments were not without authority of law, the plaintiff in the present action cannot be permitted to try the title by which their positions are held. He has a complete and adequate remedy under the provisions of section 1948 of the Code of Civil Procedure, and the courts ought not, as suggested in *Talcott v. City of Buffalo (supra)*, to be burdened reviewing the discretionary powers of civil service commissioners and other local officials (*Keim v. United States*, 177 U. S. 290, 296) in actions of this character (see *People ex rel. Buckley v. Roosevelt*, 19 App. Div. 431; *People ex rel. Requa v. Neubrand*, 32 App. Div. 49, 51; *People ex rel. Faile v. Ferris*, 76 N. Y. 326, 328-9; *Matter of Hart*, 159 N. Y. 278, 285, 286).

The interlocutory judgment appealed from should be reversed with costs, and the demurrers to the complaints should be allowed.

All concur.

NOTE TO SECTION 1925, CODE OF CIVIL PROCEDURE—TAXPAYER'S SUIT WHEN MAINTAINABLE.

The right for a taxpayer to sue public officers is confined to cases "where the acts complained of are without power, or where corruption, fraud, or bad faith amounting to fraud, is charged."

But the statutes do not warrant the conclusion that a taxpayer

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is authorized to bring an injunction suit against private persons or corporations upon the theory that a public officer ought to have brought such an action and that upon his failure to do so the taxpayer may step into his place and prosecute the same as plaintiff. *Gallagher v. Keating*, 29 Civ. Pro. 234.

The act complained of must also be illegal to authorize such action on the part of the taxpayer. *People ex rel. Scott v. Pitt*, 64 App. Div. 316-323.

Action by a body authorized to act by law may not be attacked collaterally. *Bank of Staten Island v. City of New York*, 68 App. Div. 231-233.

But the payment of claims not a proper town charge or unauthorized may be enjoined in a taxpayer's suit under this section of the Code of Civil Procedure. *Rockefeller v. Taylor*, 69 App. Div. 176-179; S. C., 74 N. Y. Supp. 812; see also *Talcott v. City of Buffalo*, 125 N. Y. 280; *Bush v. O'Brien*, 164 N. Y. 205.

It is not every act complained of, but only in those cases where they are without authority and illegal, or where corruption, fraud, or bad faith amounting to fraud, exists, that relief can be had under this section. *Davenport v. Walker*, 57 App. Div. 221-223; *Ziegler v. Chapin*, 126 N. Y. 342; *Bush v. O'Brien*, 58 App. Div. 118; *Kurtz v. Clausen*, 38 Misc. 105.

PARTIES—INSUFFICIENCY OF COMPLAINT.

If the suit is not against official acts or official waste of the funds or property of a municipality a taxpayer's action cannot be maintained; and it is only incidental to a complete determination to join the municipality and others as necessary parties. *Wenk v. City of New York*, 36 Misc. 426.

In re Judicial Settlement of the Account of William B. Davenport.

IN THE MATTER OF THE JUDICIAL SETTLEMENT
OF THE ACCOUNT OF WILLIAM B. DAVENPORT,
PUBLIC ADMINISTRATOR OF THE COUNTY OF
KINGS, AS ADMINISTRATOR, ETC., OF SARAH L.
CULLEN, DECEASED.

COURT OF APPEALS—NOVEMBER, 1902.

§ 2732.

*Representation Under the Statute of Distribution—Construction
of Section 2732, Code of Civil Procedure, as Amended by
Chapter 319, Laws 1898.*

September 1, 1898, the Statute of Distribution (Civil Code, sec. 2732, sub. 12) was amended by striking out the clause, "No representation shall be admitted among collaterals, after brothers' and sisters' children," and substituting therefor the clause, "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate." An intestate died thereafter leaving as her nearest relatives nephew, niece, uncles, aunts; first, second and third cousins. *Held* (Cullen, J., dissenting), that the nephew, niece, uncles and aunts take to the exclusion of the cousins.

Held also (Cullen, J., dissenting), that the persons who take in their own right remain the same under the amendment, but the persons who take by representation are those whose principals would have taken real property in intestacy.

(*Decided November, 1902*).

Appeal from an order of the Appellate Division, Second Department, which modified a decree of the Surrogate's Court of the County of Kings, and, as so modified, affirmed the same.

Thomas H. Troy, for appellant.

William T. Carlisle, for respondents.

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BARTLETT, J.—This appeal involves the construction of the statute regulating the distribution of personal property (sec. 2732, Code of Civil Procedure, as amended by chap. 319, Laws of 1898). This amendment took effect September 1, 1898.

The intestate died on the 15th day of September, 1898, possessed of personal property only. She left no husband, ancestor, descendant, brother or sister, but was survived by a nephew and niece, Charles Christopher Carroll and Chloe Carroll Rehm, children of a deceased brother; two uncles, two aunts, forty-five first cousins, thirty-three second cousins and one third cousin, making, in all, eighty-one next of kin, the first, second and third cousins being descendants and representatives of deceased uncles and aunts.

This appeal is taken by the special guardian of three second cousins and one third cousin, being infants over the age of fourteen years.

The decree of the Surrogate's Court divided this estate into eighty-one shares and distributed the same to all of said collaterals. The nephew and niece appealed from this decree, insisting that they were entitled to one-half each of the net amount of the personal property to be distributed.

The Appellate Division modified the decree of the surrogate, holding that the nephew and niece and the two uncles and two aunts were next of kin in equal degree, being the third degree, and that the estate should be divided into six equal parts and so distributed. The other collaterals named were excluded.

The special guardian and appellant now claims that the order of the Appellate Division should be reversed and the decree of the surrogate affirmed, while the only respondents on this appeal, the nephew and niece, insist that they alone are entitled to the personal estate of the intestate. The nephew and niece have not appealed from the order of the Appellate Division.

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Prior to the amendment of 1898 subdivision 12 of this section read as follows: "No representation shall be admitted among collaterals, after brothers' and sisters' children."

By chapter 319 of the Laws of 1898 this subdivision was amended so as to read as follows: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

The theory upon which the decree of the Surrogate's Court rests is that the nephew and niece, uncles and aunts are all next of kin in equal degree, and that the descendants of deceased uncles and aunts, of whom there are a large number, take by representation.

It is not reasonable to assume that the Legislature in amending a statute, coming down, in substance, from Justinian, providing that "no representation shall be admitted among collaterals after brothers' and sisters' children," would open wide the gates to all collaterals, thus dividing up estates, in many instances, into sums so small as to benefit no one.

In repealing this ancient statute the Legislature provided a new rule, to the effect that "representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

The descent of real property is regulated by chapter 547 of the Laws of 1896, article IX, known as the Real Property Law (vol. 1, p. 620).

Section 287 reads as follows: "If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother

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and sister of the intestate whenever such descendants are of unequal degrees."

Section 288 provides for the manner in which uncles and aunts of the intestate and their descendants shall take "if there be no heir entitled to take, *under the preceding sections.*"

It follows that if the Surrogate's Court was right in holding that the law of representation was to control among collaterals, the nephew and niece would be entitled under section 287 of the Real Property Law to the entire estate.

It is clear, from the reading of section 288, that uncles and aunts and their descendants inherit only when there are no brothers and sisters of their descendants.

It therefore becomes necessary to construe section 2732 of the Code in the light of all its provisions and of the new rule as to representation established by the amendment of subdivision 12 of this section in 1898.

Subdivision 5 reads: "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives."

Subdivision 10 reads: "Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their share shall be equal."

The important question in this case is, reading all the provisions of section 2732 together, when is the rule of representation to be invoked in the distribution of personal property?

In subdivision 5, as quoted, we have the clear rule laid down that the next of kin, in equal degree to the deceased and their legal representatives, are to take, and subdivision 10 declares that where the next of kin entitled to share are in equal degree, their shares shall be equal.

The surviving nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and under these circumstances it is unnecessary to invoke the rule of representation.

To give any other construction to the present law of distri-

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bution would be, in the great majority of cases, to divide estates into shares so small as to benefit none of the next of kin.

We cannot conceive that it was the intention of the Legislature to establish any such rule of distribution as indicated by the decree of the Surrogate's Court.

If the construction we have indicated is the true reading of this section, it follows that the order of the Appellate Division must be sustained.

The result of our construction would be that if, in this case, the nephew and niece had not survived, but the two uncles and two aunts were living at the time of testatrix's death, these four of equal degree would have taken the estate. If, however, the testatrix left no nephew, niece, uncle or aunt her surviving, but there were descendants of nephews and nieces, uncles and aunts, then the rule of representation would apply "in the same manner as allowed by law in reference to real estate."

As already pointed out, under the Real Property Law, brothers and sisters and their descendants inherit in the first instance, and if there be none then the aunts and uncles of the intestate and their descendants take.

The order of the Appellate Division should be affirmed, with costs to both parties payable out of the estate.

CULLEN, J. (dissenting)—I cannot agree with Judge Bartlett as to the effect of the amendment of 1898. Section 2732 of the Code provides how distribution shall be made in intestacy. This case falls within subdivision 5: "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, *and their legal representatives.*" The uncles or aunts and the nephews or nieces of a deceased are equally near of kin to him (McClellan Surrogate's Practice, 642), all in the third degree (Hurtin v. Proal, 3 Brad. Surrogates, 414; 2 Kent Com. 424).

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Subdivision 11 of the section provides that, when such descendants or next of kin are of unequal degree of kindred, the surplus shall be divided between them according to their respective stocks, so that those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled. If these provisions had stood alone, personal property would have been distributed by representation as always real property has descended. But subdivision 12 provided that "no representation shall be admitted among collaterals, after brothers' and sisters' children." It was questioned whether this inhibition prevented representation of those who are not brothers' and sisters' children, such as the descendants of uncles and aunts or of cousins. But this court held in *Adee v. Campbell* (79 N. Y. 52) that the limit of representation prescribed by this subdivision applied to all collaterals, and that hence first cousins took to the exclusion of second cousins. By the amendment of 1898 the provisions of subdivision 12 were repealed, and in lieu thereof it was enacted: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate." This provision is general and applies to all collaterals. If, as was held in the case cited, subdivision 12, as it formerly stood, applied to representation among all collaterals, is it not clear that the repeal of that provision, and the direct enactment that representation shall be admitted among collaterals to the same extent as in the descent of real estate, authorizes representation among all collaterals? It is suggested that "it is not reasonable to assume that the Legislature in amending a statute, coming down, in substance, from Justinian, providing that 'no representation shall be admitted among collaterals after brothers' and sisters' children,' would open wide the gates to all collaterals, thus dividing up estates in many instances into sums so small as to benefit no one." It seems to me that this is just what the Legislature has done and that it could have used no more efficacious language for

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that purpose. The fact that in this case the property will be divided into small sums cannot affect the general rule. If the estate were large, even small fractions would represent substantial amounts. Moreover, representation among descendants of brothers and sisters is quite likely in many cases to cause minute subdivision of the estate. That in this case the descendants of the uncles and aunts are numerous, while there are no descendants of deceased nephews and nieces, is merely the accident of the particular case.

I do not see that the law which obtains in the descent of real estate, that the descendants of brothers and sisters inherit to the exclusion of uncles and aunts, has any application to the question under discussion. It may be argued that by the enactment of the new provision in subdivision 12, the Legislature intended to provide that the distribution of personalty should be made in accordance with the descent of realty. But this argument proves too much, for if it is sound it would prevent the uncles and aunts from sharing in the estate. There can be no consistent or logical construction of the statute as it now stands which will admit uncles and aunts and exclude their descendants. There is this further suggestion to be made. If we affirm the doctrine of the Appellate Division, what is the law when an intestate leaves uncles and aunts and descendants of deceased uncles and aunts, but no brothers or sisters or descendants of brothers and sisters? Will representation then be allowed in the shares of deceased uncles and aunts? If it is denied, it will be in express contradiction of the direction of the statute, that representation shall be allowed among collaterals in the same manner as admitted in reference to real estate. But on what principle can it be admitted consistently with the decision below? The contention that since the change in the statute, distribution is to be made in conformity with the descent of real estate, is not seriously pressed. If it were, a perfect answer to it is that subdivision 5 of section 2732 remains in full force, and directs that the distribution shall be, not in accordance with the descent of

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real estate, but "to the next of kin in equal degree to the deceased and their legal representatives."

I think the judgment must be reversed and the representatives of deceased uncles and aunts allowed to share. This seems to me the only logical construction of the statute.

PARKER, Ch.J.; O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur with BARTLETT, J.; CULLEN, J., reads dissenting opinion.

Order affirmed.

CAROLINE STEINBACH, RESPONDENT, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

COURT OF APPEALS—NOVEMBER, 1902.

§ 452, 499.

Defect of Parties—Construction of Section 499 and 452, Code Civil Procedure.

In an action to re-form a life insurance policy by inserting the name of the plaintiff as payee therein, and to recover upon it as re-formed, the defendant company may raise the objection, for the first time, at the close of the evidence that the beneficiaries named in the policy as written should have been made parties defendant.

In such a case section 499 of the Code, which provides that if objection to a defect of parties is not taken by answer or demurrer it is deemed waived, should be read in connection with section 452, to the effect that when it appears that a complete determination of the controversy cannot be had without the presence of other parties, or whose rights will be prejudiced thereby, the court must direct them to be brought in.

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It is the duty of a court of equity to require that the trial shall be so conducted that further litigation over the subject-matter may be prevented, and inconsistent judgments growing out of it avoided.

(Decided November, 1892).

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department affirming a judgment entered upon a verdict.

This action was brought to reform a policy of life insurance as to the name of the beneficiary and to recover upon it as reformed.

Omitting the formal parts, the allegations of the complaint were that "Prior to the 19th of October, 1896, one Max Fehrman was indebted to the plaintiff (whose name was then Caroline Lampp, she having since married her husband William Steinbach) in divers sums of money which he was unable to pay. Said Fehrman was then insured by the defendant under policies of insurance upon his life for various amounts, the premiums upon which said policies were being then paid by the plaintiff, and constituted a part of the sum then due and owing by the said Fehrman to the plaintiff, all which was known to the defendant. And thereupon, and for the purpose of securing to the plaintiff the payment of the moneys, or a part thereof, then due and owing to her from said Max Fehrman, the defendant agreed with the plaintiff, in consideration of the premises, and of the payment by the plaintiff of the weekly premiums hereinafter mentioned, to issue a further policy of insurance upon the life of said Fehrman, for the benefit of the plaintiff, in the sum of \$270, and to make said policy payable to the plaintiff upon the death of said Fehrman.

"Thereafter, on or about the 19th day of October, 1896, in pursuance of said agreement, so made between the plaintiff and defendant, the plaintiff paid the defendant the sum of twenty-five cents, the amount of the first weekly premium above referred to, and the defendant thereupon, in pursuance

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of said agreement, duly made and executed its policy of insurance in writing, and delivered said policy to the plaintiff. The said policy of insurance was dated the 19th day of October, 1896, and declared that in consideration of the application in said policy mentioned, and of the weekly premiums therein stated, namely, the sum of twenty-five cents per week during the life of said Max Fehrman, the defendant promised to pay to the executors, administrators or assigns of the person named as the insured in said policy, to wit, the said Max Fehrman, the sum of \$135, within twenty-four hours after acceptance by it of satisfactory proof of the death of said Max Fehrman during the continuance of said policy, provided said Fehrman should die after the expiration of six months and within one year from the date of said policy, and the sum of \$270 provided said Fehrman should die after the expiration of one year from said date.

"Upon the delivery of said policy of insurance to the plaintiff, the defendant, by its agent, stated to the plaintiff that the same was issued by the defendant in pursuance of the said agreement, and in conformity therewith, and that, by the terms of said policy, the defendant did insure the life of said Max Fehrman, and did agree upon his death to pay the amount of said insurance to the plaintiff, upon her paying the premiums called for by the said policy, namely, twenty-five cents per week, and complying with the other conditions thereof, and said defendant did so state and represent to this plaintiff for the purpose of inducing this plaintiff to pay the said premiums, and made such representations intending that the plaintiff should rely thereon, and relying thereon should pay the said premiums accordingly.

"The plaintiff is a Swede and has a very imperfect knowledge of the English language as spoken, and an especially imperfect knowledge thereof as written, and did not know until informed thereof by her counsel, after the death of Fehrman, hereinafter mentioned, that said policy of insurance was not payable to her by its terms. On the contrary, the

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plaintiff believed the said statements made by the defendant, as aforesaid, and relied upon the same, and so believing and relying, paid the said first premium and all subsequent premiums upon said policy of insurance up to the date of the death of said Fehrman hereinafter set forth; and plaintiff believed when she received said policy and paid the first of said premiums and all other premiums, that the same was payable to her, and that she would be entitled to receive the money that should become payable thereunder upon the death of said Fehrman.

"The said statements and representations were false and untrue. The said policy was not payable to this plaintiff as represented by the defendant, nor did the same conform to the said agreement, but, instead, was payable to the executors, administrators and assigns of the said Fehrman, and gave this plaintiff no interest whatever in any moneys that might become due thereunder, and no rights whatever in respect to said money.

"The words in said policy, 'unto the executors, administrators or assigns of the person named as the insured in this policy,' whereby the same was made payable to the executors, administrators and assigns of said Fehrman, were inserted therein instead of the words 'unto Caroline Lampp, her executors, administrators or assigns,' or similar words, making the same payable to the plaintiff, either by mistake of the defendant or its draftsman, or else they were so inserted, and the statements and representations were made in pursuance of an intent by the defendant to defraud the plaintiff. And the said policy of insurance was accepted in said form by the plaintiff by mistake and upon the supposition and in the belief that the same was payable to her."

No assignment of the policy was alleged or proved. Fehrman died on the 19th of September, 1897, and the usual proof of death was promptly served on the defendant.

The relief demanded was that the name of the plaintiff be substituted in the place of the beneficiaries named in the

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policy, and that she have judgment upon the policy as thus reformed. The answer is substantially a general denial. No attempt was made by the defendant to raise the objection that there was a defect of parties defendant by demurrer or answer, but upon the trial, at the close of the evidence, its counsel moved to dismiss the complaint on the ground, among others, "that there is a defect of parties defendant here; the instrument that is sought to be reformed is payable to Max Fehrman or his executors, administrators or assigns, and neither of those parties nor the next of kin are parties to the action." The motion was denied and the defendant excepted. The trial court found the facts substantially as alleged in the complaint, directed a reformation of the policy as therein demanded, and awarded judgment to the plaintiff thereon for the amount claimed. After affirmance by the Appellate Division, two of the justices dissenting, the defendant came here.

William O. Campbell, for appellant.

Walter Large, for respondent.

VANN, J.—By the judgments below, the names of the beneficiaries in a policy of life insurance were stricken out and the name of a stranger substituted as sole beneficiary without making the former parties to the action or giving them an opportunity to be heard. This has been done upon the ground that the insurance company, which is the sole defendant, waived the objection that there was a defect of parties defendant by not taking it either by demurrer or answer as provided by section 499 of the Code of Civil Procedure. That section, however, must be read in connection with section 452, which provides that "the court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."

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The apparent inconsistency between these sections was the subject of controversy before the courts for a long time, but we think it was dispelled by the judgment in *Osterhoudt v. Board of Supervisors of the County of Ulster* (98 N. Y. 239, 243). That was an action by taxpayers to vacate audits of town accounts for illegality and fraud, and to restrain the levy of a tax for their payment. The persons in whose favor the audits were made were not parties to the action, and while the defendants omitted to raise the objection by demurrer or answer, they raised it upon the trial, where it was overruled. In reversing the judgment rendered in favor of the taxpayers, we said: "Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground; but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment. When a defendant is sued alone upon a joint contract, if he omits to set up a non-joinder of his co-contractor by demurrer or answer, judgment may pass against him alone, because judgment against one joint contractor will not prejudice the other, but may relieve him from liability. The other branch of the rule would be illustrated by an equitable action brought for the cancellation of a mortgage, executed to two persons as mortgagees, in which only one of the mortgagees was made defendant. The court could not proceed to a decree for the plaintiff without the presence of the other mortgagee. The distinction is between those who are necessary parties and those who are proper parties merely. When persons who are necessary parties are not joined, the court will not proceed until they are brought in. * * * Under the Code the court is bound to take the objection when a proper case is presented."

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It was further held that the persons in whose favor the audits had been made were necessary parties, because they were "primarily interested," and the judgment was reversed because they had not been joined.

Referring to section 452 in a still later case (*Mahr v. Norwich Union Fire Ins. Soc'y*, 127 N. Y. 452, 459), the court said: "While the statute does not in terms prohibit the court from determining the controversy, unless all the necessary parties are brought in, that is impliedly commanded, and is the established practice in all equitable actions" (citing, among other cases, *Peyser v. Wendt*, 87 N. Y. 323; *Sherman v. Parish*, 53 id., 483; *Van Epps v. Van Dusen*, 4 Paige, 64).

A court of equity always seeks to do complete justice and to make its judgments so full and comprehensive as to quiet the controversy in all its aspects and as to all persons. Thus every one who is compelled to obey its decrees is protected, further litigation is prevented, and the unseemly spectacle of inconsistent judgments rendered by the same court is avoided.

The plaintiff insists that the rights of the personal representatives of Max Fehrman are not prejudiced by the judgment appealed from, because they are not bound by it and can still recover upon the policy, notwithstanding the judgment of reformation rendered in this action. This might lead to inconsistent judgments and a double recovery, which is precisely what section 452 was designed to prevent. Moreover, the hazard of collecting a second judgment in favor of a different plaintiff against the same defendant upon the same cause of action might in some cases be an important consideration, and the remoteness of the risk in this case does not affect the principle. The court cannot know how great the risk may be and hence should not permit it, even if it thinks it is remote. A complete determination of a controversy cannot be had when there are persons, not parties, whose rights must be determined, in form at least, at the same time that the rights of the parties to the action are determined. According to the policy under consideration, as it was written,

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the personal representatives of Mr. Fehrman are entitled to the proceeds, yet the judgment below, rendered without notice to them, takes the policy away from them and gives it to the plaintiff. They had a material interest in the subject-matter of the action, yet they were deprived of it without an opportunity to be heard and were cast in judgment without being sued. While they were not bound by the judgment which does all this in form, still the determination of the controversy is necessarily incomplete because they are not bound. Such a judgment, although not binding, would affect the market value of the policy and tend to prevent a disposition thereof either absolutely or as collateral to a loan. There cannot be a complete determination as to which of two persons is the beneficiary of a life insurance policy without the presence in court of both. The personal representatives of Fehrman were necessary parties and the court should have dismissed the complaint unless within a reasonable time they were brought in, not necessarily for the protection of the defendant as it had neglected its rights, but for their own protection, as well as the seemly and orderly administration of justice. The judgment should be reversed and a new trial granted, with costs to abide the event.

HAIGHT, J. (dissenting) —I do not think that this case is one contemplated by the provisions of section 452 of the Code of Civil Procedure; and I do think that sections 488 and 499 of the Code, to the effect that where it appears upon the face of the complaint that there is a defect of parties, the objection thereto must be taken by demurrer or answer, or else it will be deemed to have been waived by the defendant, have been practically nullified by the construction given by the prevailing opinion. The purpose of this latter section of the Code was to require the question of defect of parties to be raised at the earliest possible moment, either by demurrer or answer, so as to avoid the involving of the plaintiff and the public in the expenses of a long and useless trial upon

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the merits. If the insurance company can wait until the final close of the trial, and then by motion for direction of a verdict raise the question of defect of parties for the first time in a case of this character, I see no reason why it may not be done in every case; and thereby the express provision of the statute that it should be deemed waived by the defendant becomes of no force or effect, and the county may in every case be subjected to the expense of maintaining a trial upon the merits, when it would have been unnecessary had the objection been seasonably made.

Section 452 of the Code was designed for a different purpose, and, to my mind, is not in conflict with the provisions of section 499. Indeed, we are required to construe the provisions together for the purpose of making one harmonious system of practice. It often occurs upon the trial of cases that the names of persons are disclosed who have an interest in the subject-matter of the litigation, who have not been made parties, and where the defect does not appear upon the face of the complaint. In all such cases the provision of section 452 applies. The court, therefore, "may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in." Under this provision the court is given the power to determine the controversy, as between the parties before it, unless in doing so it is going to prejudice or destroy the rights of others who are not parties. The recovery of a judgment in this case against the insurance company does not prejudice or destroy the rights of the executor or administrator and assigns of the decedent, if such there be. They have not been made parties to this action, and are not in any way bound by the determination made. Their rights are neither prejudiced nor destroyed. The defendant alone is affected by the judgment. It may, under some remote contingency, be required to pay this in-

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surance again. But this insurance company is not an infant or ward of the court. It is fully able to take care of its own interests, and we need not be concerned therewith. It had the right to save itself from double liability by raising the question of defect of parties by demurrer or answer, but it did not see fit to do so. Instead, it proceeded with the trial. It could have protected itself by giving notice of the bringing of the action to the personal representatives of the decedent, and asking them to defend. It may have done so, and the personal representatives of the decedent may be here defending in the name of the insurance company. We are not advised as to the steps taken by the insurance company to protect itself, nor is it any part of our duty to ascertain. The presence of other persons to the controversy, which the court must direct to be brought in, is fairly illustrated by the case of *Osterhoudt v. Board of Supervisors Ulster Co.* (98 N. Y. 239). That was a taxpayer's action brought against the board of supervisors to prevent waste, by annulling the audit of the bills of certain individuals, and to restrain the board from levying a tax for their payment, upon the ground that the claims were illegal, inequitable, unjust, false and fraudulent. It will at once be seen that the very purpose of the action was to affect the rights of the claimants who were not made parties, by restraining the levying of the tax for their payment. In such a case they were necessary parties, and the court very properly held that they must be brought in.

Again, section 499 of the Code provides a statutory and mandatory rule of pleading. Defect of parties must be raised by demurrer or answer when the defect appears upon the face of the complaint. This rule of pleading is as positive and distinct as the rule that the material allegations of the complaint shall be denied by the answer, or else they shall be deemed admitted; or that the Statute of Limitations must be pleaded or deemed waived. If the courts can disregard this requirement to raise the question by demurrer or answer, they may with equal propriety disregard the requirements

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for denials of complaints, or of the pleading of the Statute of Limitations.

The complaint in this action demands judgment for the sum of \$135, with interest thereon from September 29, 1897. This is the final relief sought by the plaintiff. In order to recover this amount the plaintiff asks that the policy be reformed by inserting the plaintiff's name in the place of the executor, administrator and assigns of the decedent. The decedent appears to have been a poor person, unable to pay his board bill, and we are not advised as to whether he left a will or that the same has been proved, or that any administrator has been appointed of his estate. If there has been, he may become a rival claimant with the plaintiff for the insurance. Cases of this character are not uncommon, and wherever rival claimants appear the courts have always permitted the insurance company to interplead them if it so desired. But in no case have I ever heard of its being a ground for dismissal of complaint where the insurance company has, for reasons of its own, neglected to interplead.

This court is, by the constitution, limited in its judgment to the review of questions of law only. It has no power to review discretionary rulings or orders of the court below. In this case the defendant's counsel, at the close of the testimony, "renewed his motion to dismiss the complaint on the same grounds as stated at the close of the plaintiff's case; and on the further ground that there is a defect of parties defendant." The motion was denied and the defendant excepted. The motion, as we have seen, was to dismiss the complaint, not to stop the trial and have the necessary parties brought in, but to deprive the plaintiff of her cause of action by the dismissal of her complaint. I do not understand that the court could properly have dismissed the complaint upon this ground; the most that it had the power to do was to stop the trial, and to make an order for the bringing in of the necessary parties. Consequently the exception taken to the refusal to dismiss the complaint presents no error of law upon which

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this court can properly base a reversal. I, therefore, favor an affirmance.

PARKER, Ch.J.; GRAY and BARTLETT, JJ., concur with VANN, J.; O'BRIEN and MARTIN, J.J., concur with HAIGHT, J.

Judgment reversed, &c.

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SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—DECEMBER, 1902.

§ 999.

Libel on City Magistrate—Exemplary Damages—Excessive Verdict.

A publication falsely charging a city magistrate, among other things, with making "An Attack on Women from the Bench," delivering "Another Bitter Tirade against the Sex," and causing a woman complainant to faint in court, saying that "Anyone out at that hour in the morning (two o'clock) deserved to be attacked," and refusing to entertain her complaint of assault and robbery by a number of hackmen or listen to the evidence offered in support of it, is libelous *per se*.

Such a libel recklessly or carelessly published will support an award of exemplary damages.

The proprietor of a newspaper who resides abroad, leaving the publication of his newspaper here in the hands of his employees, is liable for exemplary damages for the reckless or malicious publication of such a libel by his subordinates in his absence.

The establishment of rules by the proprietor of the newspaper, which, if observed by his employees in his absence, might have

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prevented the publication of the libel, is insufficient to exempt him from liability for exemplary damages.

Letters written by the plaintiff to the manager of the defendant's newspaper in defendant's absence, denouncing articles published as false and malicious, and demanding a retraction and apology, are admissible in evidence against the defendant as bearing upon the question of actual malice in publications subsequently made.

In such an action a verdict of \$40,000 transcends all reasonableness and propriety, and is therefore excessive. *Held*, that the present verdict should be reduced to \$25,000.

(Decided December, 1902).

Appeal from judgment entered on verdict, and from order denying motion for new trial.

Flamen B. Chandler, for appellant.

Eugene Frayer, for respondent.

PATTERSON, J.—In an action brought to recover damages for alleged libels published concerning the plaintiff, in the defendant's newspaper, the jury rendered a verdict for the plaintiff in the sum of \$40,000. The defendant appeals from the judgment entered upon that verdict and from an order denying a motion for a new trial.

The plaintiff was a magistrate of the City of New York, in the Borough of Manhattan. The matter of which he complains was published in four issues of the defendant's newspaper, namely, those of August 21, 22, 23 and 24, 1899. There are four causes of action set forth in the complaint, each publication being made a separate cause of action. They all relate to flagrant misconduct imputed to the plaintiff in the discharge of his official duty. The article first published by the defendant and complained of by the plaintiff is the most serious. The three subsequent articles are persistent repetition of the matter charged in the first. In that article it is stated that on the 20th day of August, 1899, the plaintiff was presiding in the Fifth District Magistrate's

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Court in the Borough of Manhattan, and that on that day one Annie Rome made a complaint against four men of robbery and criminal assault perpetrated upon her at about one or two o'clock in the morning of Saturday, August 19, 1899. In giving an account of the case, the article was headed:

"Attack on Women from the Bench—Magistrate Crane Delivers Another Bitter Tirade Against the Sex and Causes Mrs. Rome to Faint—Declared Her Story False—She Had Accused Four Cab Drivers of Attacking and Robbing Her Near Grant's Tomb at Two in the Morning—Magistrate Said Any Woman Out at That Hour Deserved To Be Attacked."

It then proceeds to state that the complainant Rome accused four cab drivers of having brutally attacked and robbed her, leaving her unconscious in the road; that a detective explained the case upon arraignment of the prisoners and asked that they be held upon the charge of assault and robbery; that the woman declared that she had engaged a cab driver to take her to her home; that instead of driving her there, the cabman she employed took her to Riverside Drive and One Hundred and Twenty-fourth street, where four men attacked and robbed her; she exhibited a finger, from which, she said, the cabman had torn her wedding ring, skinning the finger almost to the bone, and she showed how her clothing had been torn by her assailants. The article then proceeds to state as follows: "The magistrate listened to the woman's recital with apparent impatience (and said), 'The idea of a respectable woman being out in the streets in the morning at that hour is absurd. It's monstrous to believe the story you tell. Who would believe the tale of a woman who was drunk and claimed that she was robbed? It's all rot, and I don't believe it, and neither does anybody else.'

"'Oh, don't, your Honor!' begged the woman, growing pale. 'I was not drunk, as the police know well. I am a good woman, and you do me a great injustice.'

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"The woman was not intoxicated when she was brought to the station house," declared detective Prumty. 'I will make an affidavit to that effect.'

"I don't want your affidavit," replied the magistrate. 'No good woman ought to be out in the street at that time, and if she was attacked at that hour she deserved it. She could not expect anything better. I will not entertain the complaint of assault and robbery, because, in the first place, I don't believe it, and in the second, the woman could not hope to receive more consideration from men at that hour.'

"Oh, don't, don't! For God's sake, don't! I am respectable!" cried the humiliated and mortified woman, as she fell to the floor in a faint. The magistrate stopped long enough in his bitter tirade to instruct the attendants to pick up the woman and carry her to a bench near by, where after some minutes she was revived.

"Indignation at the magistrate's remarks were perceptible among the spectators and court attendants. The stern face of the magistrate showed neither sympathy for the woman nor regret at his ungracious words. He ordered the clerk to change the complaint to one of disorderly conduct against John McDermott and John Lacy, two of the cabmen, and held them in \$300 bonds each to keep the peace for three months. Crowley and Martin Mulady, the others, were discharged.

"The police yesterday were bitter in their criticism of the magistrate's course."

The three other articles are, as stated before, reiterations of the charges made against the plaintiff, and, in some respects, they amplify them. They not only reassert, but make the effort to substantiate the original charge. They also refer to alleged misconduct of the plaintiff in other cases that had been before him. In the second article published, it is stated that it was "not the first time that Magistrate Crane has figured in peculiar decisions"; that "on the same Sunday morning he declined to issue a warrant

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asked for by Edward J. Murphy, an agent of the Society for the Prevention of Cruelty to Children, the agent having with him a child whose left ear was torn and whose face and body were covered with bruises"; that several months ago the plaintiff was accused of saying from the bench that nine women out of every ten were liars, but when he saw that in print the next day he denied the declaration. Other matters of misconduct of the plaintiff are referred to in this article, but they do not require special consideration now.

In the third article it was said that the district attorney would give the grand jury a chance to investigate the ruling of the magistrate who had freed alleged robbers and that the "police stick to the statement of the tirade in court and the ignoring of evidence."

It is unnecessary to state in detail the contents of all the different articles. Enough has been referred to, or quoted, to show that what was published of and concerning the plaintiff, if false, tended to degrade him in the public estimation and to hold him up to the contempt and scorn of the community as a hectoring, bullying, insulting magistrate, who refused to give heed to a complainant who appeared before him making accusations of the gravest character against persons whom she charged with the commission of outrageous crimes. If the contents of the articles published in the defendant's newspaper were true, it is evident that the plaintiff was absolutely unfit to fill the judicial position he occupied.

The defendant, in his answer, undertook to justify the publications made and to set up the truth in justification. On the trial, evidence was given as to what took place in the magistrate's court on the 20th of August. That evidence was, to some extent, conflicting, but the jury found that the account given in the defendant's newspaper of the conduct of the plaintiff on that occasion was false.

We do not understand the learned counsel for the defend-

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ant as claiming that if, upon the whole evidence, the jury was authorized to make that finding, the plaintiff was not entitled to a verdict; but his contention is, that under the proven facts of the case and under the law as it is settled in this State, the plaintiff was not entitled to recover exemplary damages. That contention is founded, in the first place, upon the fact that the defendant had no personal connection with the publication of the libelous articles, and did not in any way personally participate in the preparation or circulation of them. When they appeared in his newspaper he was absent from the United States. Before going abroad, he left with the editors, sub-editors and others engaged upon his newspapers, a notice that it was an imperative rule of his office that nothing reflecting upon the reputation of any person or corporation should be published in either of his newspapers until, after strict investigation, the truth of the same had been ascertained. It is strenuously urged that this proof, which was introduced in support of allegations in the answer, in mitigation of damages, was such as to prevent an award of vindictive damages. We have heretofore decided that it was not, in cases where the same notice given by the proprietor of the newspaper was disregarded by those conducting it for him in his absence (*McMahon v. Bennett*, 31 App. Div. 16; *Morgan v. Bennett*, 44 App. Div. 323; *O'Brien v. Bennett*, 59 App. Div. 623). We see no reason for holding otherwise in this case, notwithstanding the elaborate argument of the learned counsel for the appellant. There is nothing in the recent case of *Craven v. Bloomingdale* (171 N. Y. 439) which sustains a contrary view. There the subject of punitive damages was under consideration in an action brought against a master for the act of his servant in causing an alleged arrest of the plaintiff in that action, and it was held that the charge of the trial judge instructing the jury that they had power, if they saw proper, to award such damages, without instructing them that they could not be awarded unless there was proof that

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the acts of the servant were malicious; that the master was implicated with the servant therein, or had, either expressly or impliedly, authorized or ratified them, was erroneous. Here, however, is the case of a proprietor of a great metropolitan journal leaving it in his absence in the control of a general manager, of editors, of sub-editors, and a staff of reporters. The authority is confided to them to carry on the general business of editing, publishing and circulating that newspaper. As was said by Spencer, J., in *Andrews v. Wells* (7 Johns, 261), where a man is the owner of a paper and gives over conducting it to another, he thereby constitutes him his general agent and is answerable for all his acts done in the execution of that trust, whether within or beyond the intention of the principal.

The notice the defendant gave to his employees cannot be construed as a limitation of authority, such as would absolve him from liability from the consequences flowing from their failure to conform their conduct to its requirements. It was intended for their guidance and direction and was a warning to them. Their acts in disregard of that warning must in legal effect be considered as if they were his own.

But the question of punitive damages is presented by the learned counsel for the appellant in another aspect. It is claimed that the trial judge committed error and misled the jury as to the degree of malice that would authorize an award of punitive damages. The court charged as follows: "It is the law of this State that a libel recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages. The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. I may here add that the basis of punitive or exemplary damages is the alleged malice, and unless you reach the conclusion that there is malice, there can be no award of exemplary damages. There can only be a recovery for actual damages, namely, damages to the feelings and to the reputation of the plaintiff." The court

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then further instructed the jury in these words: "A plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. It becomes then a question for the jury, whether the malice is of such a character as to call for exemplary or punitive damages, and that question is not to be taken away from the jury because the defendant gives evidence which tends to show that there was in fact no actual malice, but when he gives evidence tending to prove the absence of actual malice, then it is the duty of the judge to submit to the jury the question as one of fact, whether such malice existed in the publication." That language is almost literally quoted from the dissenting opinion of Davis, P. J., in *Samuels v. Evening Mail Ass'n* (9 Hun, 204), which dissenting opinion was adopted by the Court of Appeals (75 N. Y. 604) as its own, and states a rule which has ever since been regarded as settling the law in this State on that subject. But the learned judge also expressly charged the jury that there was no evidence in this case of ill-will on the part of the defendant or any of its employees; that is, any personal ill-will. He said, "When that (ill-will) is established in respect of a defendant, it is evidence of actual personal malice and will afford a basis of an award for exemplary damages. *That is not this case.* If, however, this publication is false and untrue, libelous in its character, then malice may be implied, and we have, instead of malice which grows out of ill-will, hatred or ill-feeling, what is known as malice in law or implied malice, and when that is established, then there is a foundation for exemplary or punitive damages, under the law of this State, and I have already laid down the rule on that subject and on that branch of the case." Referring to other portions of the charge to ascertain what the rule laid down in that connection was, we find that the court stated that "it is the law of this State that a libel recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages."

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The charge must be considered as an entirety, and when we read what was said respecting punitive damages from implied malice, we must consider it in connection with the statement in the charge that a libel recklessly or carelessly published would entitle the plaintiff to punitive damages, as well as where the libel was inspired by personal malignity. The recovery of punitive damages in an action for libel is not restricted to cases of actual malice, but may be given for a libel recklessly or carelessly published, as well as one induced by personal ill-will (*Smith v. Matthews*, 152 N. Y. 152). Here the trial judge stated that this was not a case of actual malice on the part of the defendant, and, in effect, that it was only by reason of implied malice from a reckless and careless publication of the libel that the defendant could be held liable for punitive damages, and such an instruction as that was approved also in *Smith v. Matthews* (*supra*). We find nothing in *Krug v. Pitass* (162 N. Y. 164), or the other cases cited by the appellant, in conflict with that view.

That the first of the libelous articles in this case was recklessly published, the jury were authorized to believe from the evidence relating to the origin of that article, which was prepared by McQuade, a reporter, who had no personal knowledge of the occurrence of which he wrote, who received the information at second hand, and who, fully appreciating the serious character of the charges he made, failed to make proper verification of his statement before the article was sent to the defendant's paper for publication, and who had no actual ground for believing the statements of his article to be true before he sent it in. The other articles were published after the plaintiff had protested against the first article, and had declared in a letter written to the general manager of the defendant's newspaper that the contents of that article were false.

We have examined the various exceptions of the defendant, one of which relates to the plaintiff being allowed to

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testify that the evidence submitted to him as a police magistrate when the four men were arraigned before him on the charges of robbery and assault was insufficient to hold them. That was merely a statement by the plaintiff of the reason for not holding the accused persons upon the specific charges Mrs. Rome made against them. It is also urged that the court was in error in striking out parts of the testimony of the witness McQuade, who wrote the first article published in the defendant's paper. McQuade, who received his information from one Lindley, who was a reporter for another newspaper, testified in effect that Lindley had informed him that his (Lindley's) assistant, Lynch, was present during the proceedings before the plaintiff on the 20th of August; that Lynch made a written statement of what occurred at that time and placed it on Lindley's desk. McQuade wrote the article from the information he received from Lindley, and not having heard from Lindley anything further concerning the matter, he sent the article to the night editor of the defendant's newspaper. McQuade also testified further and in detail as to what took place between himself and Lynch on the day of the publication of the article, and to a full conversation he had with Lynch upon the subject of that article, and all of the testimony relating to that conversation was stricken out. It seems to have relation to the question of actual malice in the publication, but what was so stricken out was reinstated by the court, and was before the jury when the cause was submitted to them.

Exceptions were also taken to the admission of letters written by the plaintiff to the manager of the defendant's newspaper, in which he denounced the articles of which he complained as being false and demanding an apology from the publishers of the newspaper. These letters were undoubtedly offered as indicating actual malice in the publications subsequently made. They were competent upon that subject, although the case did not, as it went to the jury, turn upon that question, the judge specifically instructing

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the jury that actual malice consisting of personal ill-will or malignity was not in the case. Nor do we think it was error to allow the plaintiff to state what parts of the article published in the issue of August 23, 1899, were true, and what untrue. The witness was not called upon to express an opinion, but to state facts, which he did in his answer, admitting the truth of some of the statements in the article and specifically pointing out other statements which he swore were false. This method of examination may be of doubtful propriety, but we do not think such an error was committed as requires a reversal of the judgment on that ground. Nor do we think it was error to admit in evidence the copies of the defendant's newspaper of July 26, 1899, and August 22, 1899. They were admissible upon the point of actual malice, which the plaintiff undertook to establish, but which, as before stated, was eliminated from the case in the judge's charge.

An exception was taken to a ruling of the court admitting in evidence an article published in the *New York World* of August 21, 1899, commenting on the conduct of the plaintiff in connection with the inquiry into the Rome charges on the preceding day. That article was introduced on the cross-examination of Shober, a reporter for the *World*, called as a witness for the defendant. He did not write the article, but gave the information from which it was written. The writer "got his facts wholly" from the witness. The article was used "for the purpose of affecting the story which this witness had given" on his examination in chief. But the whole of this *World* article was printed in the defendant's newspaper in its issue of August 23, and is a part of the defamatory matter constituting the third cause of action set forth in the complaint. It was not error to receive it in evidence.

It was not error to reject as evidence the entry in the book referred to by acting Police Captain Norton on his

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examination as a witness for the defendant. That book contained only copies of reports made by the witness to his superior officers. He never compared it with the original report. It was not in his handwriting, but was written by Officer Murphy. The original was accessible, and its production could have been compelled by subpoena. None of the other exceptions to the rejection or admission of evidence requires special consideration.

Notwithstanding the character of these libels, which were so grave as to entitle the plaintiff to exemplary damages, we cannot escape the conclusion that the amount awarded by the jury was altogether excessive, and that, even as punishment, that amount transcends all reasonableness and propriety. It is very true that damages are within the discretion of the jury; but even where they are awarded for punishment, their very exorbitancy may show that in fixing the quantum the jury were actuated by passion. Section 999 of the Code of Civil Procedure, which permits the granting of a new trial for excessive damages, announces a rule, apparently of general application. In *Fry v. Bennett* (9 Abb. Pr. 45), which was an action of libel in which exemplary damages were awarded, it was said that the court would not interfere with the verdict of the jury unless such damages were so outrageous as to strike every one with the enormity and injustice of them so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, as was held in *Coleman v. Southwick* (9 Johns. 51).

Here, as before remarked, we think the jury must have been influenced by passion or prejudice in rendering this enormous verdict, and we are of the opinion that a new trial should be granted, unless the plaintiff stipulates to reduce the recovery to the sum of \$25,000.

The order denying the motion for a new trial and the judgment must be reversed, with costs, unless the plaintiff

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stipulates as above suggested. If that stipulation is given, the judgment and order will be affirmed, without costs to either party of this appeal.

O'BRIEN and HATCH, JJ., concur.

INGRAHAM and LAUGHLIN, JJ., dissent.

IN THE MATTER OF THE ESTATE OF MARY KILLAN, LATE OF ROCHESTER, N. Y., DECEASED.
MARTIN KILLAN, PETITIONER, APPELLANT, v.
MILES T. O'REILLY, ADMINISTRATOR, RESPONDENT.

COURT OF APPEALS—DECEMBER, 1902.

§§ 2726, 2727.

Administrator's Account—New Accounting at the Instance of Person Not a Party to Former Accounting.

An administrator who has rendered his account in the estate and has distributed it under a decree of the surrogate to certain cousins of the intestate, may subsequently, upon a petition of a brother of the deceased who was not made a party to the proceeding, be required to render an account.

The brother is not bound in such a case to apply to have the former accounting opened and to be let in, as the granting of such an application is discretionary with the court; but the proceeding having been void as to him, he may disregard it and apply for an accounting under sections 2726 and 2727 of the Code of Civil Procedure.

(Decided December, 1902).

Appeal by the petitioner, Martin Killan, from an order of the Appellate Division, Fourth Department, affirming a

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decree of the Surrogate's Court of Monroe County dismissing the proceedings instituted by the petitioner for a judicial settlement of the accounts of the administrator, respondent, of Mary Killan, deceased, and also denying an application for a commission to issue to take testimony in Ireland.

George D. Peck, for appellant.

James M. E. O'Grady, for respondent.

BARTLETT, J.—The petitioner, as the alleged brother and only next of kin of the intestate, proceeds under section 2726, subdivision 1, and section 2727 of the Code of Civil Procedure, which provide that a judicial settlement of the accounts of an administrator may be compelled by the next of kin, or any party in interest, after the expiration of one year from the issuance of letters of administration. The Code defines who is a "person interested" as follows: "The expression, 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or proceeds thereof," &c. (Code Civ. Pro., sec. 2514, subdiv. 11).

Mary Killan died intestate at Rochester on the 24th day of August, 1898. In the following October letters of administration were issued to Miles T. O'Reilly, as a creditor, on his own behalf, he being the undertaker who attended to the funeral, &c., of the deceased.

The decedent left personal property amounting to the sum of \$1,514.77.

In December, 1899, proceedings were instituted to settle the accounts of the administrator, and certain persons appeared who claimed to be cousins of the intestate. The administrator contested these claims, and the surrogate, after trial, adjudged and decreed that claimants were cousins of the intestate, her only heirs at law and next of kin, and entitled to share in her estate.

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In February, 1900, the surrogate made his decree, adjudging and commanding the administrator to distribute the estate to these cousins after payment of debts, expenses, commissions, &c.

In January, 1901, this petitioner, Martin Killan, residing in Ireland, filed his petition in the Surrogate's Court of Monroe County, in which he claimed to be the sole next of kin of the intestate, and after setting forth the issuing of letters of administration, alleged that no accounting had been made by the administrator and asked for a citation directing him to show cause why he should not render an account. This petition is based on the fact that the petitioner was not a party to the proceedings for accounting and distribution, although a brother of the intestate. Thereupon citation was duly issued by the Surrogate's Court, and the administrator appeared and served his answer to the petition, wherein he set forth the accounting proceedings and his due discharge; also denied that petitioner is a brother of the deceased. Thereafter petitioner moved for an order that a commission issue authorizing him to examine the petitioner therein and eight other witnesses upon interrogatories, and to make certificate of the same to the Surrogate's Court. The motion was denied and this proceeding dismissed, with costs, and a decree and order entered to that effect, which the Appellate Division affirmed on appeal.

The learned surrogate, on dismissing the proceeding, delivered an oral opinion, in part as follows: "The court holds that the proceedings upon the judicial settlement of the administrator are before the court, of which it takes judicial notice, by which it appears that there has been a judicial settlement of the accounts of the administrator of this estate *to which claimant was not a party. He was neither cited, nor did he appear.* The court further holds that the decree made therein *is entirely inoperative as to this claimant,* but that the court having acquired jurisdiction of the subject-matter of the judicial settlement and

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the estate having been settled in that proceeding, it is incumbent upon this claimant to now come in under that proceeding by petition or otherwise and ask that it be opened, giving notice to the persons who then appeared and were affected by that decree, and that the administrator cannot be compelled to account independently, he having already accounted and his account being filed and before the court, at the instance of any number of claimants who may invoke the aid and process of the court for that purpose."

The Surrogate's Court made the following findings, among others: "That the hearing upon said motion was continued until the 7th day of April, 1901, upon which occasion said petitioner appeared by counsel and said administrator appeared by counsel and moved that the application for the order be denied and that the proceedings for the accounting be dismissed."

"It appears from the proceedings upon the judicial settlement of the accounts of the administrator which are before the court and of which the court takes judicial notice, that there has been a judicial settlement of the accounts of the administrator of this estate *to which the claimant was not a party*; that the court acquired jurisdiction of the subject-matter of the judicial settlement and the estate has been settled in that proceeding."

The surrogate made three conclusions of law, the third of which reads as follows: "That the order that a commission issue to (naming commissioner), authorizing him to examine the petitioner herein, and also (naming eight witnesses) as witnesses for the petitioner, under oath, upon interrogatories to be annexed to such commission, and to take and certify the depositions of the petitioner and of such witnesses, and to return the same with the commission through the post office or according to the directions therein or therewith given, be and the same hereby is denied; and that the proceeding against the administrator for a new accounting be and the same hereby is dismissed, and that

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the said administrator have \$25 costs and his disbursements."

The petitioner duly excepted to these conclusions of law, and we thus have presented the question whether the dismissal of this proceeding can be justified as matter of law. The dismissal of the proceeding resulted in a final decree (*Village of Champlain v. McCrea*, 165 N. Y. 264).

Under these findings the decree of the Surrogate's Court in the original accounting proceeding is void as to this petitioner.

"It is an elementary principle, recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as of the subject-matter, and that the want of jurisdiction over either may always be set up against the judgment when sought to be enforced, or any benefit is claimed under it" (*Ferguson v. Crawford*, 70 N. Y. 253, 256; *Hood v. Hood*, 85 N. Y. 578).

In *Freeman on Judgments* (4th ed., vol. 1, sec. 117) the learned author says: "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."

The only question presented by this appeal is whether the petitioner was liable to have his proceeding for an accounting dismissed and he remitted to a motion to open the decree in a proceeding absolutely void *as to him*.

It is well settled that an application to a court to open its judgment is always addressed to its sound discretion, and that the denial of the motion involves no substantial right.

In *Foote v. Lathrop* (41 N. Y. 358, 361) it was held that an order of the Supreme Court denying a motion to set aside a regular judgment in that court upon the ground that the defendant was not served with process, and the

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appearance for him was wholly unauthorized, is not appealable to this court; that no party has a substantial right, within the meaning of the Code, to have a regular judgment against him set aside on motion; that it is in the discretion of the court, in which such judgment was rendered, to set it aside or not; and even if void they may leave the party affected by it to show it so in a proper action. Judge—Grover said: "It would still rest in the discretion of the court whether to entertain a motion to vacate the judgment, or leave her to show the judgment void, as to her, whether interposed as an obstacle to her pursuit of her right to the land." This case was followed in *Beards v. Wheeler* (76 N. Y. 213) and *People ex rel. Brush v. Brown* (103 N. Y. 684).

In estate of McCunn (15 N. Y. State Reporter 712) this point was involved. An executor of an estate filed an account on which a decree was entered. Some years later he filed a second account, citing therein certain grandnieces of the deceased who were not parties to the first accounting. These grandnieces moved to open the decree on the first accounting on the ground that they had not been made parties. Surrogate Rollins, of New York, in denying the motion, said: "I am referred to no decided cases which support the notion that persons not parties to an accounting proceeding and not bound by the decree therein, pursuant to section 2742 of the Code, can successfully claim that such decree be opened under circumstances like the present."

The learned courts below erred in holding that the petitioner was not entitled to maintain the proceedings instituted by him and that he must seek his remedy by a motion, which is merely an appeal to the discretion of the court. The petitioner is asking no favor, but is enforcing a substantial right, if it be true that he is a brother of the intestate.

The surrogate was undoubtedly right in suggesting that the petitioner should give notice to the persons who appeared

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in and were affected by the original proceedings. The proper practice was not to dismiss the proceeding instituted by this petitioner, but to require him to amend his citation and bring in the parties who were cited or appeared on the original accounting. The petitioner having complied with this requirement would be in a position to apply for a commission with interrogatories, and the parties cited could join therein and be duly represented at the execution thereof. The citation should be amended as suggested. If the petitioner succeeds in establishing that he is a brother of the intestate he is entitled to an accounting under the provisions of the Code which he has invoked.

The respondent has argued a number of points that possibly should receive special consideration, although most of them are covered by that which we have already said and the authorities cited.

We have the positive finding of the Surrogate's Court that the petitioner in this proceeding was not cited in the accounting proceedings and was not a party thereto, and that the same was wholly inoperative as to him. It is at this point that we encounter the defect in the administrator's proceedings for an accounting that has led to his present peril of being called on to account for funds paid out under a decree that does not protect him against this petitioner if the latter establishes the fact that he is intestate's brother.

It is argued that it would be a strange miscarriage of justice if the administrator, after having proceeded to an accounting and obtained a decree directing him to pay over to certain parties, could be compelled to again account in an independent proceeding on the petition of some one claiming to be nearer of kin than those cited or appearing in the prior proceedings, and consequently entitled, if the claim is established, to the personal property of the testator.

We have presented here the ordinary situation of a person not joined as a necessary party in an action or special

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proceeding ignoring the judgment therein, and proceeding, as this court said he might in *Foots v. Lathrop* (41 N. Y. 358, 361), to show the judgment void when interposed as an obstacle to the remedy he has invoked.

An administrator is not left in the helpless and unprotected position that is assumed to be the case in the argument of the respondent. The Code of Civil Procedure provides for his ample protection by permitting him to sue out a citation running against persons unknown (secs. 2518-2523). A citation properly issued under these provisions binds unknown next of kin precisely as if they were named therein. There is no evidence in the record that any effort was made to cut off unknown next of kin, and the citation that was issued is not before us. On the contrary, as already pointed out, it is expressly found that the petitioner was not a party to the former proceeding. This administrator is in the position of any plaintiff who proceeds to judgment without joining all of the necessary parties defendant.

The effect of the judicial settlement of an account is stated in section 2742 of the Code: "A judicial settlement of the account of an executor or administrator, either by the decree of the Surrogate's Court, or upon an appeal therefrom, is conclusive evidence against all the parties *who were duly cited or appeared*, and all persons deriving title from any of them," &c.

It follows that the decree in the accounting proceeding binds only the parties thereto, and the administrator not having cut off unknown next of kin is liable to respond to any claim that one or more of them may successfully make.

The respondent has cited a number of cases relating to the jurisdiction of the court as to the subject-matter, apparently overlooking the fact that no question is raised on this appeal as to the jurisdiction of the Monroe County Surrogate's Court of the estate of the intestate.

The contention of the appellant is that the court acquired

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no jurisdiction of his person, and the record conclusively supports this position.

We are referred to Mr. Redfield's Surrogate Practice (p. 865, 5th ed.), where he discusses the subject of evidence of jurisdictional facts. The learned author observes: "The rule is stated to be that 'when certain facts are proved to a court or officer, having only special and limited jurisdiction, as a ground for issuing process, and there is a total defect of evidence as to any essential fact, the process will be void; but where the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose.'"

This quotation is from *Staples v. Fairchild* (3 N. Y. 41). This case involved the regularity of certain attachment proceedings and discusses the powers of courts of limited jurisdiction. It is a direct authority in favor of the petitioner herein on the point that the court acquired no jurisdiction of his person. The learned judge says: "It is well settled that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise."

It is unnecessary to discuss the other cases cited in detail, as they may have no bearing upon the failure to obtain jurisdiction of the person of the petitioner.

The much-discussed and overruled case of *Roderigas v. East River Savings Institution* (63 N. Y. 460) is cited, wherein it was determined in a Surrogate's Court that the intestate was dead, when, in fact, the contrary was true. The same case was before this court in another phase (76 N. Y. 316), where it was held that the basis of the former decision was that the statute authorized the surrogate to decide

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upon evidence, and that it now appeared that there was nothing amounting to proof.

In *Scott v. McNeal* (154 U. S. 34), this case was expressly overruled as violating the fourteenth amendment of the Constitution of the United States, which ordains, among other things, "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The court said: "In *Roderigas v. East River Savings Institution* (63 N. Y. 460), in 1875, a bare majority of the Court of Appeals of the State of New York decided that the payment of a deposit in a savings institution, to an administrator under letters of administration, issued in the lifetime of the depositor, was a good defense to an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was living or dead, and, therefore, his determination of that question was conclusive. * * * And in a subsequent action between the same parties, in 1879, the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never, in fact, considered the question of death, nor had any evidence thereof—thus making the validity of the letters of administration to depend, not upon the question whether the man was dead, but upon the question whether the surrogate thought so (*Roderigas v. East River Savings Institution*, 76 N. Y. 316). * * * No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party. The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court (*Pennoyer v. Neff*, 95 U. S. 714, 733), 'mean a course of legal proceedings according to those rules and principles which have been established in

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our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance.’” (See, also, *Lavin v. Emigrants’ Industrial Savings Bank*, 18 Blatch., 1, 24, U. S. Circuit Court, Southern District of New York).

In the case at bar it was essential not only that the court should have jurisdiction of the subject-matter, but of the person of petitioner.

The Code of Civil Procedure (sec. 2473) provides, in terms, that there is a presumption of jurisdiction where the necessary parties were duly cited or appeared, when a decree or other determination is drawn in question collaterally.

The argument of the respondent, in brief, is that it was sufficient if the court had jurisdiction of the subject-matter, to sustain the position that the petitioner must resort to the accounting proceeding if he desired to enforce his rights in the Surrogate’s Court.

The respondent further argues that not only is the present proceeding unauthorized on behalf of the petitioner, but that he has an absolute right to intervene in the accounting proceedings, open the same on motion and litigate his rights therein.

We have already pointed out that the motion to open the proceedings is an appeal to the discretion of the court, and that the petitioner herein could not be remitted to an uncertain remedy, in a proceeding which resulted in a decree that does not bind him.

It is further argued that, assuming it to be an appeal to the discretion of the court, nevertheless, the Surrogate’s Court did exercise its discretion, and decided that the petitioner might intervene in the accounting proceeding.

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The record before us discloses no such decision, as the learned surrogate simply intimated in his oral opinion that it was incumbent upon the petitioner to come in under the accounting proceedings by petition or otherwise and ask that it be opened; there is no intimation as to what disposition the court would make of that motion.

We, however, regard this as wholly immaterial, as the decree in the accounting proceedings, for reasons already stated, is absolutely void as to this petitioner.

It is contended that the petitioner, instead of instituting the present proceedings, might have filed a bill in equity, bringing in all the parties and securing such a judgment as justice dictates.

It is of no importance whether the new issue as to the petitioner being a brother of the intestate is tried in this proceeding or in the former accounting proceedings, or in a suit in equity, as the result must be the same in case he succeeds in establishing his claim, so far as the administrator is concerned.

It is argued that the Surrogate's Court would have no authority to render a decree compelling the distributees of the fund to make restitution of the same to the petitioner; nor could it vacate its former decree in the premises, having no equity powers.

We hold that the petitioner was at liberty to invoke one of two remedies: he could require the administrator to account in this proceeding, or he might have summoned him and all the parties in interest into a court of equity for a like purpose. The prior accounting proceedings in no way concern the petitioner, as he will be entitled, if he succeeds in establishing his identity as a brother of the intestate, to her entire personal estate after debts and expenses of administration are paid.

We express no opinion as to the limitations, if any, which restrain the Surrogate's Court in rendering a decree in this proceeding if the petitioner is successful. The latter has

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chosen his forum and must content himself with such relief as can be afforded him therein.

The administrator having entered and obeyed a decree of distribution that does not bind the petitioner cannot invoke it as a shield at this time. If he is subjected to loss by reason of this fact it is due wholly to his failure to avail himself of the protection which the law afforded him.

The suggestion that no question of law is presented by this appeal is disposed of by the exception to the surrogate's conclusions of law, to which reference has already been made.

The order of the Appellate Division, and the decree of the Surrogate's Court of Monroe County therein affirmed, should be respectively reversed, with costs in all the courts to petitioner to abide the event, and the case remitted to said Surrogate's Court to proceed in accordance with the views herein expressed.

O'BRIEN, J. (dissenting).—The order from which this appeal is taken dismissed an application by the petitioner to the surrogate to compel an administrator to account after he had been discharged and after he had already distributed all the estate under and in obedience to an order or decree of the surrogate directing such distribution. The petitioner claims that the former decree directed distribution to the wrong parties, and that he is, in fact, the sole next of kin of the deceased who was entitled to the estate. It is important to note at the outset that the order of the surrogate dismissing the application does not state whether it was dismissed for want of power to entertain the proceeding or in the exercise of discretion.

On the 24th of August, 1898, one Mary Killan died intestate, in the City of Rochester, leaving personal property of the value of about \$1,500. One Miles T. O'Reilly, a creditor of the deceased, petitioned for letters of administration upon her estate, and they were granted to him by the surrogate of Monroe County. More

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than a year thereafter the administrator petitioned for a settlement of his accounts, and the surrogate issued a citation directed to the next of kin and heirs at law, creditors and persons interested in the estate of the deceased to attend a judicial settlement of the administrator's accounts on the 30th day of December, 1899. The citation was duly served by publication, and on the return day thereof there appeared five persons who claimed to be cousins of the deceased and entitled to the distributive share of her estate. The administrator denied their relationship, whereupon an issue of fact was formed and tried, in which the surrogate adjudged and decreed that they were in fact cousins of the deceased, and the only heirs at law and next of kin living. He ordered the administrator to make distribution accordingly, which he did, and having filed his receipts with the surrogate a decree was entered discharging the administrator from his trust. It will be seen that this proceeding involved a decision of the issue of fact as to what persons constituted the sole next of kin of the deceased. The five cousins alleged that they were the sole next of kin and the administrator denied it. In determining the issue the surrogate decided that the five cousins were, in truth, the sole next of kin, and before he could reach that conclusion he had to determine that the deceased died leaving no parent, child, brother or sister, since the cousins could not be the sole next of kin if she had left any nearer relative. The surrogate had jurisdiction of the question to be decided. He had jurisdiction of the fund to be distributed. He had jurisdiction of the administrator and the five cousins; therefore, it would seem that his decree of distribution was made with perfect jurisdiction of the subject-matter and of the parties, and so long as that decree stands it is obviously a bar to this proceeding.

If, upon that hearing, the surrogate had found and adjudged that the deceased left a brother surviving, and that the present petitioner was that brother, and that, as such, he was the sole next of kin, and entitled to have the estate

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distributed to him, no one, I think, can doubt that it would be a perfect judgment in his favor, available to him and good as against all the world until opened, reversed or set aside, although he was not a party; and for the plain reason that the court had power to make it, and if he had power to render a judgment in his favor, he had the same power to render it against him and in favor of the five cousins, and the judgment has the same binding effect in the one case as in the other until vacated or reversed in some direct proceeding for that purpose.

About a year after the discharge of the administrator the petitioner, who signs his name as Martin *Killeen*, a different name from that of the deceased, and a resident of Ireland, filed a petition with the surrogate alleging that he was a brother of the intestate. His petition set forth the issuing of letters to the administrator, claimed that no account had been made, and asked for a citation directing him to account. Thereupon a citation was issued directing the administrator to show cause why he should not render an account, and on the return day, January 23, 1901, the administrator filed an answer setting forth his accounting in the estate, the order of distribution, compliance with that order, the filing of receipts from the distributees, and a decree of judicial settlement and discharge; he also denied Killeen's relationship with the deceased. An issue of fact was thus joined between the petitioner and the administrator, and the former was bound to show that he was, as he claimed to be, the brother of the deceased. The petitioner subsequently made application to the surrogate for a commission to take testimony in Ireland to establish his relationship, and a hearing was then had on the whole question with respect to the petitioner's right to an accounting. The surrogate denied his application for a commission to take testimony and also his application for an independent accounting, on the ground, among others stated in his opinion, that the relief to which he was entitled, if any, was to open the

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decree already entered, on notice given to the persons affected thereby, and the Appellate Division unanimously affirmed the order of the surrogate. The petitioner was not cited by name, and the surrogate found he was not a party to the prior proceedings in the Surrogate's Court, under which the estate was distributed and the administrator discharged, and his claim is that he has an absolute right to institute an independent proceeding against the administrator for an accounting in the same manner as if no accounting had ever been had, and the question involved in this case is whether the former decree of discharge does not protect the administrator against this proceeding and remit the petitioner to an application to open the decree or some other remedy. The contention in behalf of the petitioner is, that the former decree of distribution was absolutely void as to him, and of no more effect with reference to this proceeding than if it had never been made. This seems to me to be the radical and fundamental error that pervades the whole argument in support of this appeal. It is a general and universal rule that, where general jurisdiction is given to the Surrogate's Court over such a subject, and that jurisdiction depends in a particular case upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of jurisdiction, as against all the world, is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who acted upon the faith of it. It frequently happens that a surrogate makes an order or decree in which the wrong party is appointed, or administration is granted even in cases where the person alleged to be dead is still living, but as that court has jurisdiction to inquire with reference to all these facts, its orders and decrees have been held to be conclusive, even when infected with a radical error of fact, at least until revoked, vacated or set aside (*Kelly v. West*, 80 N. Y. 139; *Roderigas v. East*

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River Sav. Inst., 63 N. Y. 467; Bolton v. Schriever, 135 N. Y. 65; Staples v. Fairchild, 3 N. Y. 41; Potter v. Ogden, 136 N. Y. 384; Porter v. Purdy, 29 N. Y. 106; Redf. Law & Pr. of Sur. Ct., 5th ed. 865). In this case it is very clear that the surrogate had jurisdiction to decide as to what persons, as matter of fact, constituted the sole next of kin of the deceased and he did decide that the five cousins were, and involved in that decision is the finding that the deceased died leaving no parent, child, brother or sister, since the cousins could not be the sole next of kin if she died leaving any nearer relative. What the petitioner wants is an opportunity to retry that question. He claims that he has new evidence on the point which, if received, would show that the former finding of the surrogate in favor of the five cousins was an error of fact. He has a right to be heard and to give that evidence, but not in an independent proceeding which utterly ignores what had been decided before. The surrogate in deciding that the five cousins were the sole next of kin acted judicially, and his jurisdiction thus adjudged cannot be impeached collaterally. It can be attacked only directly in a proceeding for that purpose or by appeal. If it were otherwise and the petitioner were to succeed in his application for an independent accounting and establish his relationship as a brother of the deceased, the effect would be to have two decrees of distribution in one estate to entirely different parties made by the same court. In this case we would have one decree directing distribution to be made to the five cousins and another decree made after the administrator had been discharged directing distribution to the petitioner. Moreover, if this proceeding can be entertained the administrator, although he has accounted and distributed the fund under the order of the surrogate, must again account and pay over again to the new claimant. But that is not all. If, after responding to that demand, another party should appear claiming that he was the husband of the deceased and as such entitled to

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the personal estate in preference to all other relatives and the claim should be entertained and established in an independent proceeding, the administrator would have to respond for a third time for the estate that came to his hands. Thus the administrator would be compelled to litigate during his life with genuine or spurious claimants for an estate that he had once distributed under an order of the court that unquestionably had jurisdiction and whose decrees he was bound to obey.

The well considered case of *Exton v. Zule* (14 N. J. Eq. 501) is identical in its facts with this case. There, as in this case, a new claimant without notice claimed that distribution of the estate was made to the wrong parties in disregard of his rights without notice of a hearing to him, and the court very properly said: "It may be true that neither the first nor the second set of claimants are the real next of kin of the intestate, and that the parties actually entitled are yet undiscovered. But this will not authorize the Orphans' Court, upon every new ray of light that may be received, to set aside their own decree lawfully made, and compel the administrator to pay the estate over again to every new claimant. It is the duty of the court before the decree of distribution is made to see that the case is clearly proved. If there be reasonable room for doubt as to the rights of the parties the decree should be denied. When once made and not appealed from, it operates as an effectual shield to the administrator and protects him against all other claimants. If a party entitled to a distributive share is by the decree deprived of his rights without actual notice and without a hearing, his only remedy is against the distributees who have received the estate" (p. 514).

I think this proceeding was not authorized by any law of this State and that the decisions of the courts below to that effect are clearly right. It is a case where the petitioner has mistaken his remedy. He has a right to open and

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intervene in the proceeding that resulted in a decree of distribution and the discharge of the administrator. There are other remedies to which the claimant could resort. By the provisions of the Code, section 2482, authority is conferred upon the surrogate "to open, vacate, modify or set aside, or to enter as of a former decree or order of his court * * * for newly discovered evidence, clerical error or other sufficient cause." The petitioner could have invoked, and was bound to invoke, this power if he desired to be heard with respect to his claim. There is but one answer to this proposition, and that is that since it was in the discretion of the surrogate to grant or refuse such an application the claimant was not bound to resort to it. While some of the powers conferred upon the surrogate by this section undoubtedly are discretionary, the petitioner had the absolute right to intervene, and the surrogate had no discretion to refuse his application, since he claimed to own the estate and was deprived of his property by a decree to which he was not a party. It is quite conceivable that under our probate laws administration may be taken out upon the estate of a living person and his property distributed under a decree, but if that person, after the decree was entered, appeared before the Surrogate's Court with proof that he was the person alleged to be dead and whose property was distributed, demanding that the decree be opened or set aside, he would be entitled to a hearing and the relief as an absolute right. Any other view would lead to consequences most unjust and absurd. There are various analogous provisions of law on this subject which show that a party situated as this claimant is, or claims to be, has an absolute right to intervene. By section 445 of the Code, where service is made by publication and there is no appearance, it is provided that a party *must* be admitted to defend if he applies within seven years after the filing of the judgment roll where there has been no personal service upon him of a written notice of the entry of the judgment. The

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right secured by that section is not subject to discretion (*People v. Albany & V. R.R.*, 77 N. Y. 232; *Earle v. Hart*, 20 Hun, 75). But even if it be true that the right to open the former decree and to be heard was subject to the discretion of the surrogate, that question has no application to this appeal, since the discretion was exercised in favor of the claimant and he was permitted to come in and try the question as a party to the first accounting; therefore, so far as this claimant is concerned, it is of no consequence whether the right which was conceded to him at the hearing was absolute or discretionary.

The surrogate, on the accounting, had an issue of fact to try, and that was whether the five cousins of the deceased to whom the estate was distributed were, in fact, the sole next of kin of the deceased. He found that they were, and, therefore, he necessarily found that the claimant is not her brother. Now, the fact may have been determined erroneously and against the truth, but it cannot be denied that the surrogate had complete jurisdiction of the question, and if there was any error at all in his decision it was an error of fact and the claimant had and still has an absolute right to appeal from that decision of the surrogate and from the decree of distribution either for an error of law or fact or both, and on the hearing of that appeal he has an absolute right to give proof to show that he is the sole next of kin and that the five cousins are not (Code Civ. Pro., secs. 2568, 2569, 2576, 2586). With these remedies open to the petitioner it is very difficult for me to see that the surrogate committed an error of law reviewable in this court for refusing to entertain this proceeding. The Supreme Court has concurrent jurisdiction of matters of accounting by administrators and the petitioner had a right to bring an action for that purpose. If that court had ordered distribution and discharged the administrator, as the surrogate did, no one, I think, would claim that the decree was void, or that the claimant, though not served, had any other

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remedy than to apply to open the decree and come in to defend and prove his claim. Nor could it be asserted that in such a case the right to defend might be refused in the exercise of discretion. There cannot be, in this respect, one law for the Supreme Court and another and different law for the Surrogate's Court. If the claimant could only apply to come in in case the accounting was had in the Supreme Court, he has no other remedy under the same circumstances where the accounting was in the Surrogate's Court, and certainly not the remedy sought in this proceeding.

The surrogate found that he issued and served a citation by publication on the creditors, heirs at law and next of kin of the deceased. At the request of the claimant he found that he was not cited or a party to the accounting. All that can be meant by this finding is a conclusion on the part of the surrogate that, since his name was not mentioned in the citation and since it was not addressed to him, he, therefore, was not a party and was not cited. The whole fabric of error in this case is built upon this slender superstructure. I will not now stop to inquire whether the surrogate was bound to pass upon requests presented to him. I had supposed that the Code had done away with that practice. It certainly has in some cases (sec. 1022). But I do not regard the finding, if it can be called one, of the slightest consequence. It is universally held and understood that orders and decrees in probate courts are not made between party and party, but are in the nature of judgments *in rem* that are good against all the world, even against persons who are not cited. All that is necessary is that the court obtain jurisdiction, and it is conceded that the decree of distribution in this case was binding on the administrator, and, therefore, made with jurisdiction. Such judgments are not *in personam*, but generally adjudge the status of a person or a thing. In this case the decree adjudged that the claimant was not the brother of the

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deceased, and, hence, it determined his status or relationship to the deceased. It likewise determined the disposition to be made of the fund which was the thing or *res* over which the court had jurisdiction. When the surrogate got jurisdiction of the question as to what persons constituted the next of kin, the fact that the present claimant was not a party is wholly immaterial. The judgment is good as against all the world until it is opened, vacated or reversed (*Exton v. Zule*, 14 N. J. Eq. 501; *Clemens v. Clemens*, 37 N. Y. 73; *Herman on Estoppel and Res Adjudicata*, secs. 45-48, 290-297, 326-330; *Black on Judgments*, sec. 635; *Freeman on Judgments*, sec. 319b; 2 *Smith Lead. Cases*, 812, 813). Any one who will read the case first above cited will find it difficult to distinguish it from this. It covers the whole ground involved here and even more.

It may be profitable to stop and inquire for a moment as to the power of the surrogate in case it is held that this proceeding is authorized by any law. Of course, the proceeding is utterly futile unless the surrogate has power in an independent and collateral application, such as this is, to disregard or set aside his former decree which the administrator obeyed and was then discharged from his trust, and to make a new decree that the administrator pay to this claimant the money which he paid to others under a decree where there was perfect jurisdiction. Can he, in this proceeding, set aside his former decree and order the administrator, who has been discharged, to account and pay again simply because that decree is claimed to be affected by an error of fact, for that is all that can be alleged against it? That would plainly mean that he may review his own judgments and correct his own errors of law and fact, not upon any appeal to him for that purpose, but in another and collateral proceeding. The general powers of a court of equity do not belong to a Surrogate's Court, and that court has no power in this or any other independent proceeding to set aside or disregard its own decree of distribution, and

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the order discharging the administrator, even though either or both orders were affected by fraud (*Matter of Randall*, 152 N. Y. 508; *Sanders v. Soutter*, 126 N. Y. 193). It would be a novel proceeding for a surrogate, on the petitioner's application, to enter upon the trial of a question of fact whether he or the five cousins, who have received the money, are the sole next of kin of the deceased. That very question he tried and decided once before, and his judgment remains in full force, and is a complete protection to the administrator, as this court in principle has just decided (*Platt v. N. Y. & S. B. R'y*, 170 N. Y. 451). If the claimant has any case at all it is clear that he has mistaken his remedy, and has adopted a method of procedure that cannot be tolerated in the administration of estates, and this would be so even though his right to intervene is discretionary, as his counsel claims, since the discretion, if it exists under the law, was exercised in his favor by the surrogate, and he was permitted to come into the original proceeding. We have seen that at least three distinct remedies were open to the claimant, if he is in fact entitled to the estate of the deceased as her sole next of kin. Those remedies were: First, a motion to open the former decree. Secondly, an appeal from that decree; and, thirdly, to invoke the jurisdiction of a court of equity in regard to the whole controversy by an action in which the five distributees could be made parties and could be decreed to restore the fund distributed to them if the claim of the petitioner should be established. But it seems that, for some reason, no remedy will answer the purpose of the claimant unless he is permitted to entertain his independent proceeding which ignores all that has been done as absolutely void, although the administrator has been discharged from his trust after having distributed the estate that came to his hands in accordance with the decree of a court of competent jurisdiction. No one questions the proposition that the administrator was bound to obey that decree, and it is a

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universal rule that a trustee who acts in obedience to a decree or judgment of a court of competent jurisdiction is protected from any future personal attacks by that decree. In this case the decree of distribution is a shield and protection to the administrator and to the five distributees until it is vacated or set aside, and if that is so this petitioner has no right to attack the administrator in this independent and collateral proceeding. The administrator being bound to obey the decree, it would be quite absurd to hold that it is no protection to him, although upon its face it is regular, but that he must respond to new claimants from time to time as they may appear.

Assuming all the facts stated in the claimant's petition to be true, he can accomplish nothing in this proceeding. He must first get rid of the order discharging the administrator and the decree directing distribution. It is not enough to say that he was not a party to this proceeding so long as the court had jurisdiction over the fund, the administrator and the distributees. The court could have made a complete and binding decree in the claimant's absence, since the very question before it was with respect to the persons constituting the next of kin of the deceased. These orders did not conclude the petitioner in the sense that he may not be heard in the proper court, in the proper proceeding, but they protect the administrator and the distributees until reversed or vacated. It is very obvious, that the petitioner must invoke the broad powers of a court possessing general equity jurisdiction in order that he may compel the cousins, who are the distributees of the fund, to restore it to him through the coercive powers of that court. Any proceeding to which they are not parties cannot result in any relief to the claimant. There are two things which the petitioner must accomplish before he can recover the fund representing the estate of the deceased: (1) He must have the decree of distribution set aside or vacated and he must have the decree discharging

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the administrator set aside or vacated. (2) He must procure a decree requiring the five cousins to make restitution of a fund paid to them under an error of fact involved in the finding of the surrogate that they, instead of the claimant, were the sole next of kin. A Surrogate's Court has no power to do any of these things, since they belong to, and are part of, the functions of a court with general equity jurisdiction.

I cannot concur in the judgment about to be rendered in this case for reasons that are very obvious. I cannot believe that the decree of distribution made by the surrogate and obeyed by the administrator is, as it is claimed to be, void as against this claimant or any one else. I cannot believe that it is legally possible to have two or more conflicting decrees of distribution all in force at the same time, one distributing the estate to the five cousins and the other to this claimant. I cannot believe that an administrator who has distributed an estate that has come to his hands in exact accordance with the decree of a competent court and has been discharged from his trust can be attacked years afterward by a new claimant, at least so long as the former decree and discharge are in full force. In other words, I cannot believe that a trustee and the sureties upon his bond can be held personally liable for the estate that came to his hands and which he has distributed and disposed of under the orders of the court, so long as that decree is in full force. To state the proposition in another way: I do not believe that a trustee or his sureties can be held personally liable for obeying the judgment of the court which he was bound to obey. Cases like this are liable to arise frequently, and such cases must, in the nature of things, have been presented to the courts before, but I doubt if it was ever held by any court in the civilized world that after an administrator had distributed the estate in his hands exactly as the court directed him, that he afterwards could be held personally liable upon the appli-

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cation of a new claimant. If the laws of the State authorize or sanction any such procedure the situation would go far to justify some of the grotesque caricatures that novelists and writers of fiction have drawn to describe, or rather distort, those endless and expensive controversies in the courts concerning the distribution of the estates of deceased persons.

It is proper to observe before closing the discussion that this drastic law is to be made in a case over which this court has no jurisdiction. I have already called attention to the circumstance that there was no question before the surrogate in this application except an issue of fact formed by the allegation in the claimant's petition and the denial of this allegation by the administrator. The issue thus presented called for an inquiry as to whether this claimant was in fact the brother of the deceased. The decision of the Appellate Division is unanimous and nothing can be reviewed on this appeal except a pure question of law raised by a proper exception. There was no trial for the plain reason that the claimant was not prepared for trial and so the surrogate dismissed the proceeding. The only exception in the case is one filed after the decree was entered on the dismissal of the petition. If the surrogate could have dismissed the proceeding in the exercise of discretion then it is quite clear that the order is not reviewable in this court, since upon its face there is no statement that it was made for want of power. The claimant asked the court for a commission to examine witnesses in Ireland to prove the allegations in his petition and the surrogate refused his application in that respect. A ruling or order of a surrogate granting or refusing an application for a commission to examine witnesses in a foreign country is not reviewable in this court. The right to produce the testimony of witnesses in such a proceeding, otherwise than in open court, subject to cross-examination, is not an absolute one, but is subject to the sound discretion of the

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court (*Merchants' National Bank v. Sheehan*, 101 N. Y. 176). This court cannot say that the surrogate decided anything amounting to legal error. No one has been able to point out any question of law which the surrogate decided erroneously. If the learned counsel for the claimant desired to bring the case to this court he should have made a formal offer before the surrogate to prove the facts stated in the petition and should have excepted to the ruling in case the surrogate refused to hear such proof. I am far from suggesting that such an exception would be good, since for reasons already stated the whole proceeding was misconceived, but nothing less than that could give him any standing in this court. When a case is regularly called in the court in which it is pending and the plaintiff is not prepared to proceed to try the issue of fact involved, and neither gives proof or makes offer of proof otherwise than by an application for a commission to a foreign country of the allegations of fact upon which he relies, the dismissal of his complaint or petition is not a legal error which this court can review. That is the only assignment of error which this appeal presents. It matters not what reasons the surrogate gave for his action. This court is not concerned with the reasons of the trial courts, but with their judgments and orders. It matters not that the surrogate stated in his opinion that this proceeding was unauthorized. The fact still remains that he was not bound to wait until the claimant had gathered his testimony by commission in a foreign country. Moreover, one of the reasons given by the surrogate for dismissing the proceeding was that the claimant had not cited the five cousins who had received the estate under the former decree, so we have before us an order made by a surrogate which he had the power to make in the exercise of discretion, and there is no statement in the order that it was made for want of power to entertain the proceeding. It has been held a great many times in this court that such orders are not reviewable. As the

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surrogate was not bound to wait for the claimant to gather his proofs by commission in a foreign country, and as the claimant had not brought before the court the parties who had received the estate under the decree of the court, the surrogate had the right to dismiss the proceeding as he did, and since the body of the order contains no statement that he did not dismiss in the exercise of discretion, but for want of power, this court has no jurisdiction, as no question of law is presented (*Tilton v. Beecher*, 59 N. Y. 176; *Snebley v. Conner*, 78 N. Y. 218; *Salmon v. Gedney*, 75 N. Y. 481; *Tolman v. Syr., B. & N. Y. R.R.*, 92 N. Y. 353).

For these reasons I am in favor of affirming the order or dismissing the appeal.

HAIGHT, J. (dissenting)—I concur with O'Brien, J., for affirmance. I think the Surrogate's Court acquired jurisdiction of the proceedings for the judicial settlement of the accounts of the administrator and that the decree made therein is binding upon the administrator and all the persons cited, served and appearing upon the hearing; and that, under the provisions of the Code, but one final decree of distribution of the funds in the hands of the administrator is contemplated or provided for. I am further of the opinion that the surrogate adopted the correct practice in holding that the petitioner, not having been made a party to the proceeding and not having appeared therein, has the right, upon his application, to have the decree opened and then heard upon his claim to be the next of kin and entitled to share in the distribution of the estate.

PARKER, Ch.J., VANN and CULLEN, JJ., concur with BARTLETT, J.; O'BRIEN and HAIGHT, JJ., read dissenting opinions; WERNER, J., concurs with O'BRIEN, J.

Order reversed, &c.

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RAYMOND CONNOR, BY HIS GUARDIAN, ETC., RESPONDENT, v. METROPOLITAN STREET RAILWAY COMPANY, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—DECEMBER 1902.

§ 995.

Question of Negligence Erroneously Withheld from Jury—Necessity for Special Exceptions to Charge to Jury.

The question whether the motorman of a street car was or was not negligent, if certain facts were found to have existed, erroneously passed upon by the court as matter of law; such question upon all the facts appearing should have been submitted to the jury.

A party excepting to a charge to a jury must by some exception point to the specific proposition which the court has charged or refused to charge, or to a specific ruling on a refusal to charge to which counsel supposed himself entitled. Where several requests are made, some of which are charged and some refused, the attention of the court must be called to the ruling refusing a specific request by an exception taken to that ruling; an exception generally to the refusal of the court to charge as requested is not sufficiently specific.

(Decided December, 1902).

Appeal from a judgment entered on verdict and from an order denying a motion for a new trial.

Charles F. Brown, for appellant.

I. Newton Williams, for respondent.

MCLAUGHLIN, J.—This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

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The plaintiff, on the 4th of August, 1899, then about 14 years of age, was injured by a collision between one of defendant's cars and a truck on which he was riding. The testimony on the part of the plaintiff, so far as it relates to the collision, tended to show that the plaintiff sat on the rear of the truck, which was going in a northerly direction on defendant's tracks, and while in this position, one of the defendant's cars came up behind and collided with it; and before he had any chance to escape and without any fault on his part, he sustained the injuries complained of. The testimony on the part of the defendant tended to show that as the car came up behind the truck the motorman of the car signaled for the driver of the truck to leave the tracks, and in obedience thereto he did commence to leave the tracks; that while in the act of doing so the horse attached to the truck, or else the truck itself, came into collision with one of defendant's southbound cars, and by reason thereof the truck was forced back against and came in collision with the northbound car, and thus the plaintiff was injured. It matters little which contention be taken as the true one; it is quite clear a question of fact was presented as to defendant's negligence, as well as the contributory negligence of the plaintiff, and we should have no hesitancy in affirming the judgment were it not for an error in the charge. The trial court, at plaintiff's request, charged the jury: "If the northbound motorman, by the exercise of reasonable care, could or should have seen that there was danger of a collision between the southbound car and the van, and yet kept his car up to within a few feet of the van, so that the van was driven back into his car, then he was negligent." The defendant excepted to the instruction thus given, and we think the exception well taken.

If the jury found that the facts stated in the request were established by the evidence, then it was for them to say whether or not such facts constituted negligence on the part of the motorman—taking into consideration all of the facts

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and circumstances surrounding the collision. It was error for the court to charge, as matter of law, that if they found such facts, that then the motorman was negligent (*Kellegher v. Forty-second St. R'y*, 171 N. Y. 309). It would seem as though the motorman would have a right to assume, when the driver of the truck started to leave the tracks, that he would do so in such a way as not to collide with one of the defendant's cars going in an opposite direction. This would certainly be the natural inference and one which a reasonably prudent man would have the right to make; and the fact that he acted upon his assumption, by bringing this car close to the truck, so that he might proceed with it as soon as the truck had left the tracks, did not make him negligent *per se*. At most, it was for the jury to say whether or not his act was a negligent one. That the defendant was prejudiced by this instruction was sufficiently evidenced by the verdict rendered.

For the error thus committed, the judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P.J., and HATCH, J., concur.

INGRAHAM, J.—I concur with Mr. Justice McLaughlin, and only wish to call attention to the exception necessary to justify a review of the charge to the jury. In this case, after the charge was finished, the court said that he had been requested by the defendant to charge certain propositions which he charged, and "on behalf of the plaintiff I will charge the requests one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen and fourteen. Fifteenth, sixteenth and seventeenth I decline to charge, to which you are entitled to an exception." The requests that the court charged are then stated in the record, which included the tenth request. Counsel for the defendant then, after excepting to specific portions of the charge, said: "I except to your Honor's charging the following requests to charge made by

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the plaintiff—first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth and fourteenth.” Here the court specifically charged the tenth request made by the plaintiff, and the defendant specifically excepted to the charge of that request.

By section 995 of the Code of Civil Procedure it is provided that an exception must be taken at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case it must be taken before the jury have rendered their verdict. This exception comes within the last clause of this section, as it was an exception taken to the charge of the court to the jury, and upon the record it appears to have been taken before the jury had rendered their verdict. It was taken to a specific charge made at the request of the plaintiff, and the exception specified the particular request that the court had charged to which the defendant excepted. It is undoubtedly the rule that to entitle a defeated party to review a proposition contained in a charge to the jury, there must be a specific exception to the charge so that the attention of the court is directed to the express proposition to which counsel desires to except; or where there is a refusal to charge a request, there must be a specific exception to the ruling of the court refusing to charge the specific request. A general exception to the charge without specifying the particular proposition to which it is desired to except manifestly raises no question upon a review of the judgment, nor where several requests to charge have been presented, to some of which the court has acceded and to others refused, does a general exception to the refusal to charge as requested present a question for review. Such an exception is too general. In *Smedis v. Brooklyn & Rockaway Beach RR.* (88 N. Y. 14), at the close of the evidence counsel for the defendant presented to the court fifteen separate requests to charge. The court charged substantially as requested, and then at the close of the charge declined to charge except as already charged; to which re-

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fusal as to each of such requests the defendant's counsel then and there excepted. The court said: "We think, for the reason stated, that the court properly disposed of the questions raised by these requests to charge. But if the court erred in refusing to charge one or more of the propositions as requested, there is no sufficient exception to such refusal. It is well settled that where several requests to charge are submitted to the court, some of which are charged as requested, some charged in a modified form, and others not charged, an exception taken in the form in which it appears in this case cannot be sustained. The exception must be more specific and point out the particular request to which it is intended to apply."

In *Newall v. Bartlett* (114 N. Y. 399), it appeared that at the close of the evidence the defendant's counsel presented to the court eight requests to charge the jury. Without making any ruling upon these requests the court proceeded to deliver his charge. At its close the defendant's counsel requested the court to charge upon two additional requests, which the court charged. The counsel then excepted to one instruction embodied in the charge as delivered. The case then shows that the court refused to charge the defendant's requests except as already charged, and the defendant's counsel took an exception to the refusal to charge as to each and every one of said requests. The court say: "It does not appear which of the requests had been charged, and consequently we are not advised as to which of the requests the exceptions apply. To raise any question upon the ruling of the trial court for review in this court, the exception must be specific and point out the particular request to which it is intended to apply."

In *Read v. Nichols* (118 N. Y. 224), it appeared that at the close of the evidence the counsel for the plaintiff presented to the court thirteen separate requests to charge. Some were charged as requested, some were charged in a modified form, and others refused. At the close of the

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charge counsel stated that he excepted to the refusal to charge as requested by plaintiff's counsel in so far as the court did refuse, and to each of the refusals to charge as requested. It was held that this exception was not sufficiently definite and specific to present a question for review. In *Huerzeller v. C. T. RR.* (139 N. Y. 490), it appeared that at the close of the evidence the trial court charged the jury, and there were many requests by both sides to charge, some of which were granted and some refused. After the charge was finished and the jury had retired, counsel for the defendant excepted to the granting of the requests on the other side, and a refusal to charge those of the defendant's counsel. There was no other exception to the charge or refusal to charge, and it was said: "It is conceded by the learned counsel for the defendant that this general exception was wholly insufficient to present any question for review in this court; and so we have uniformly held" (citing the cases to which attention has been called. To the same effect is *Piper v. N. Y. C. & H. R. RR.* (89 Hun, 75). This last case was reversed by the Court of Appeals (156 N. Y. 22), but that reversal was upon the ground that the plaintiff was guilty of contributory negligence, and for that reason it was held that the complaint should have been dismissed.

The rule to be adduced from these cases requires that a party excepting to a charge to a jury must by some exception point to the specific proposition which the court has charged, or refused to charge, or to a specific ruling on a refusal to charge to which counsel supposed himself entitled. Where several requests are made, some of which are charged and some refused, the attention of the court must be called to the ruling refusing a specific request by an exception taken to that ruling; an exception generally to the refusal of the court to charge as requested is not sufficiently specific. In *McKinley v. Met. St. R'y*, decided herewith, after the requests to charge had been presented on both sides, they were ruled upon separately, and when counsel for the de-

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fendant asked the court, "And now with respect to exceptions to those portions of your Honor's charge," the court, interrupting, said: "You may take them after the jury have retired; either side may do that." After the jury retired, counsel for the defendant said, "Your Honor will allow me an exception in due form to each request which is refused and to each request which is modified," to which the court answered, "Yes"; and we hold that this request was so general, if simply taken and entered upon the record without the acquiescence of the court, it might be unavailing; but that the court having interrupted counsel when about to take specific exceptions, subsequently gave him an exception to the refusal of the court to charge his requests, that method being acceptable to the court and entered in the record as such, it was sufficient to raise the question as to the right of the defendant to have his specific requests charged which the court had refused to charge. We wish to call attention to this rule, that to entitle counsel to review a charge as actually made, there must be a specific exception to the portion of the charge which is claimed as error sufficiently definite to call the attention of the trial judge to the specific portion of the charge excepted to, and that where it is sought to review the refusal of the court to charge a request, there must be a specific exception to the refusal to charge the particular request; that a general exception to the refusal to charge as requested by the party taking the exception does not present a question for review on appeal, unless the court directs such course to be pursued and authorizes the entry of the exception to be made in that form.

HATCH, J., concurs.

O'BRIEN, J. (dissenting)—I am unable to concur in the conclusion reached by the majority of the court in this case because, under the authorities, I think the exception upon which the case is reversed is not properly before us for con-

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sideration, and, therefore, is not available. At the conclusion of the charge to the jury, some seventeen requests were presented by the plaintiff, and the trial judge stated those which he would charge and the numbers of those he declined to charge, these latter not appearing in the record. The defendant then made certain requests and, finally, just before the case went to the jury, the defendant's counsel said: "I except to your Honor's charging the following requests to charge made by the plaintiff—First, second, * * * tenth, eleventh," etc. In this way only was any exception taken to the tenth charge, which is the one in question. In *Passey v. Craighead* (89 Hun, 76) the court said: "At the close of the charge the defendant presented to the court twenty-eight requests, some of which were charged and some refused. The defendant excepted to each of the charges made by the court at the request of the plaintiff and to each qualification of those requests and to each refusal to charge either of the propositions requested by the defendant to be charged. These exceptions are wholly insufficient to present any question for review." And in the opinion written by Mr. Justice McLaughlin in *Benedict v. Deshel*, herewith handed down, it was held that where a number of requests were made by the plaintiff and refused by the court and the plaintiff's counsel said: "I except to each of your Honor's refusal to charge my several requests," the exception was not so taken as to present any question for review. The only difference between the form of the exception in that case and the case at bar is that here the numbers of the request were mentioned; but this did not point out any particular misstatement so as to afford the trial court the opportunity to correct any error, and it is the failure to so specify the objection made to the refusal that constitutes the vice in such exceptions.

I think, therefore, that the judgment appealed from should be affirmed, with costs.

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NOTE ON SECTION 995 OF CODE OF CIVIL PROCEDURE.

DUTY OF COUNSEL.

It is the duty of counsel to remain in attendance upon the court until such trial is terminated either in person or by some one competent to and authorized to act. *Cornish v. Graff*, 7 Civ. Pro. 204-208.

EXCEPTION, HOW TAKEN.

An exception must be taken to each proposition separately. A general exception will not avail. *Sanford v. Crocheron*, 8 Civ. Pro. 146-149; *Willetts v. Sun Mutual Ins. Co.*, 45 N. Y. 45, 49; *Smedie v. Brooklyn & C. RR. Co.*, 88 N. Y. 13; *Rubinfeld v. Rabineo*, 33 App. Div. 374-377.

VALUE OF SUCH EXCEPTIONS UPON APPEAL.

Questions of law raised by exceptions taken during the trial may be reviewed upon an appeal from the judgment under the provisions of this (995) section and that of 996. *Clement v. Beale*, 53 App. Div. 416-417; *Dearing v. Pearson*, 8 Misc. Rep. 269; *Lanier v. Hoadley*, 42 App. Div. 6-8.

An exception filed more than eight months after the time when it should have been taken will not avail. *Murray v. City of New York*, 60 App. Div. 541-543.

Nor can the trial court permit exceptions not in fact taken to rulings made in the trial to be inserted in the record after the conclusion of the trial without the consent of both parties. *Hill v. Warner*, 25 App. Div. 628.

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H. WHITNEY TEW, RESPONDENT, v. HENRY WOLF-
SOHN AND ANOTHER, APPELLANTS.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPART-
MENT—DECEMBER, 1902.

§ 488, SUBDS. 5 AND 6.

*Judgment Overruling Demurrer to Complaint Affirmed—Action
against Agent and Undisclosed Principal—Election of
Which Defendant Plaintiff Intends to Hold Liable.*

In an action against an alleged agent and an alleged undisclosed
principal to recover damages for a breach of contract, *Held*
that the complaint stated but a single cause of action.

A demurrer for misjoinder of parties plaintiff is authorized, but
not of parties defendant (Code, sec. 488, subd. 5).

Demurrer will lie for defect of parties plaintiff or defendant (Code,
sec. 488, subd. 6), but a "defect" of parties as used in this
provision means an omission and not a misjoinder.

Assuming that the plaintiff is entitled only to judgment against
one of the defendants and that he must elect which party he
intends to hold, he cannot be required to make that election
until the close of the case.

The doctrine of election in cases of this character does not apply
until there has been not only a recovery against either the
principal or agent, but a satisfaction of the judgment as well.
(Per Laughlin and O'Brien, JJ.).

(Decided December, 1902.)

Appeal by defendant Henry Wolfsohn from an interloc-
utory judgment of the Supreme Court entered in the Clerk's
office of the County of New York on the 23d day of May,
1902, overruling his demurrer to the amended complaint
herein.

Benno Loewy, for appellants.

Gilbert Ray Hawes, for respondent.

H. Whitney Tew, Respondent, v. Henry Wolfsohn et al., Appellants.

LAUGHLIN, J.—The action is brought to recover damages for a breach of a contract alleged to have been made between the respondent and the appellant for an undisclosed principal, his wife, the other defendant, by which the respondent, a professional singer, constituted the appellant his sole manager for America and Canada for a term of three months and the appellant agreed to arrange a concert tour and to secure engagements for the respondent in advance, and to recover money advanced to the appellant by the respondent and also money received by the appellant for the respondent. The sole ground of the demurrer is that causes of action have been improperly united. That is the only question necessarily presented by the appeal; but the trial court would not be aided by our decision, if it were confined to that point, and for this reason we deem it proper to discuss the entire question relating to the appellant's liability, which has been quite fully argued and considered.

First. The appellant contends that two causes of action are stated in the complaint, one against him for making the contract in form as principal, which does not affect his wife and the other against her as the undisclosed principal, which does not affect him. We think that the complaint states but a single cause of action. Only one contract was made, but the plaintiff seeks to hold both defendants, the wife because the contract was made for her, and the husband because he led the plaintiff to believe he was making it for himself (*McLean v. Sexton*, 44 App. Div. 520). Clearly, on the facts alleged, either party is liable to the plaintiff on the contract set forth. The demurrer is not upon the ground that the complaint fails to state facts sufficient to constitute a cause of action against the appellant. Moreover, the complaint clearly states a cause of action against the appellant, he not having disclosed both the fact that he was acting as agent and the name of his principal (*McClure v. Central Trust Company*, 165 N. Y. 128; *De Reimer v. Brown*, 165 N. Y. 410).

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A demurrer for misjoinder of parties plaintiff is authorized (Code Civil Procedure, sec. 488, subd. 5); but not of parties defendant. Demurrer will also lie for a defect of parties plaintiff or defendant (Code Civil Procedure, sec. 488, subd. 6). But a "defect" of parties as used in this provision of the Code means an omission and not a misjoinder. In other words, it means that some one should have been sued who has not been joined; and not that too many have been joined as defendants (*Martin v. Buck*, 11 Johns. 271; *N. Y. C. R.R. v. Schuyler*, 17 N. Y. 592; *Palmer v. Davis*, 28 N. Y. 242; *McIntosh v. Ensign*, 28 N. Y. 169; *Potter v. Ellice*, 48 N. Y. 321; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Brownson v. Gifford*, 8 How. Prac. 389; *Nichols v. Drew*, 94 N. Y. 22).

Even if the plaintiff must elect before judgment to determine which party he intends to hold, it cannot be said that by bringing this action against both there has been an election to hold the principal and not the agent (*Mattlage v. Poole*, 15 Hun, 556). Of course, the complaint does not show which party was served first or whether the other defendant was served at all.

Second. Assuming that the plaintiff is only entitled to judgment against one of the defendants and that he must elect which party he intends to hold, he cannot be required to make that election until the close of the case. With the exception of the case of *Booth v. Baron* (29 App. Div. 66), the facts in which are not fully stated, and which has been expressly disapproved by *McLean v. Sexton* (*supra*), all of the decisions in this jurisdiction, so far as they have been brought to our attention, are to the effect that there is no conclusive election until judgment is entered against one or the other of the parties liable (*Mattlage v. Poole*, 15 Hun, 556, approved in *Coe v. Raymond*, 22 Hun, 461; *Cobb v. Knapp*, 71 N. Y. 348; *Mason v. Cockroft*, 3 Duer 366; *Equitable Foundry Co. v. Hersee*, 33 Hun, 178; *Tuthill v. Wilson*, 90 N. Y. 423; *Meeker v. Cleghorn*, 44 N. Y. 349; *Lindsay v. Gager*, 11 App. Div. 93). Such seems to be the rule in

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England (*Curtis v. Williamson*, L. R., 10 Q. B. 57). It would be manifestly unjust to require the plaintiff to elect in such case, at least before all the evidence is in. Neither defendant can be prejudiced by his not electing; and the plaintiff, if he elected to hold the agent, might be defeated upon the ground that both the agency and the name of the principal were disclosed, and, if he elected to hold the principal, the jury might find that the contract was not made for the latter.

Third. I see no sound basis for the application of the doctrine of election in cases of this character until there has been not only a recovery against either the principal or agent, but a satisfaction of the judgment as well. I recognize that this doctrine is inconsistent with the dictum contained in many decisions, and it is perhaps inconsistent with the general doctrine stated by the courts, particularly in *Tuthill v. Wilson* (*supra*); but it is not without precedents. The rule is thus stated broadly in *McLean v. Sexton*, which was an action to foreclose a mechanic's lien where it was sought to hold both an agent and an undisclosed principal for the deficiency. I see nothing in the nature of that action to distinguish it from this, and find nothing in the opinion indicating any intention on the part of the court to limit the doctrine to the case of the foreclosure of such liens. Such is also the doctrine of the courts of Pennsylvania (*Beymer v. Bonsall*, 79 Pa. 298). The Pennsylvania case was cited with approval by our Court of Appeals in *Cobb v. Knapp* (*supra*). This doctrine is also sustained, I think, by the case of *First National Bank v. Wallis* (84 Hun, 276, *aff'd* 156 N. Y. 665). In that case judgment was recovered against a corporation upon a note apparently upon the ground that it was the maker, the note having been signed by its president and treasurer with the abbreviations of the titles of their respective offices following their signatures; but the judgment was not paid. Subsequently an action on the note was brought against the president and the treas-

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urer individually, it having been decided that on the face of the note they were the makers (First National Bank v. Steuzer, 84 Hun, 35). The individuals, when sued, sought to escape liability on the ground that the bank by proceeding against the corporation to final judgment exercised a right of election between inconsistent remedies, but the court held that their liability could only be determined by payment of the debt; and, as has been stated, this decision was affirmed by the Court of Appeals. The doctrine of election, in its general application, is unsuitable and harsh, and it should not be applied to an action brought upon a contract made by an agent without disclosing his principal, until the debt has been satisfied by one or the other.

It follows that the interlocutory judgment should be affirmed, with costs, but with leave to the appellant to answer upon payment of the costs of the demurrer and of the appeal.

O'BRIEN, J., concurs.

PATTERSON, J., concurs in all but third branch of this opinion.

VAN BRUNT, P.J., and McLAUGHLIN, J., dissent.

H. P. Hall, Resp., v. Theo. Gilman, et al.; C. R. Garczynski, Aplt.

HELEN POTTS HALL, RESPONDENT, v. THEOPHILUS GILMAN AND EDWARD L. MORTON, AS ADM'RS, ETC., ET AL.; CAROLINE R. GARCZYNSKI, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—FIRST DEPARTMENT—DECEMBER, 1902.

§ 488, SUBD. 6.

Demurrer to Complaint Overruled—Agreement by Party, Since Deceased, that Another Should Have and Be Entitled to All His Property.

Where it appeared that a party, who has since died intestate, entered into an agreement with the plaintiff, in consideration of her becoming his adopted daughter and sustaining that relation to him, entering and managing his household and rendering him the same service, obedience and affection as his daughter, that she should have and become entitled to all his property, both real and personal, as fully and to the same extent as if she were his sole lawful issue, *Held* that the agreement may be enforced in equity.

An agreement is not to be treated as void for uncertainty when it is pleaded that a decedent entered into it with the plaintiff and that the latter performed it on her part. It is a fair inference that she agreed to fulfill her part of the agreement.

Held that such an agreement is not void as against public policy, the allegations of the complaint showing estrangement and bitter hostility of decedent towards his relatives.

Where one cause of action is stated, based upon a single agreement, it cannot be said that causes of action have been improperly united because the enforcement of the contract will affect defendants in different ways; it is not essential that all the parties should be interested in the same way or affected alike by the judgment demanded.

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Where a cause of action is sufficiently stated against a demurring defendant, it is not a valid ground of demurrer that other defendants have been improperly united. A demurrer will not lie for misjoinder of parties defendant.

(Decided December, 1902.)

Appeal by defendant Caroline R. Garczynski from an interlocutory judgment of the Supreme Court entered in the Clerk's office of the County of New York on the 9th day of September, 1902, overruling her demurrer to the amended complaint.

Raphael J. Moses, for appellant.

George C. Lay, for respondent.

LAUGHLIN, J.—This is an action for the specific performance of an agreement alleged to have been made with the plaintiff by George F. Gilman, since deceased, "that if she should continue to live with him and care for him as a daughter until the time of his death, she should have and be entitled to all his property, both real and personal, as fully and to the same extent as if she were his sole lawful issue." The plaintiff alleges that the decedent was an inhabitant of the City and County of New York; that he died at Bridgeport, Conn., on the 3d day of March, 1901; that he entered into an agreement with her on or about the 1st day of November, 1900; that for several years prior to his death the decedent "having conceived a strong personal regard for this plaintiff, and being desirous that she should become a member of his household, adopted this plaintiff as his daughter, and did make her a member of his household, and thereafter and until the time of his death plaintiff resided with him as his daughter, receiving from him the care, support and affection of a father, managing his household and rendering to him the same obedience and affection as if she had been his natural daughter"; that the agreement was made "in consideration of said services and

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affection and as an inducement to her to render the same as long as he lived, and for other good and valuable consideration"; that the "plaintiff did at all times since the making of said agreement up to the time of the decease or said George F. Gilman perform the said agreement on her part, according to the true intent thereof, abandoning for such purpose, upon the wish and desire of said Gilman, all other prospects in life, and devoting herself solely to his care, welfare and happiness as a daughter should"; that the considerations and services so rendered to the decedent by the plaintiff were of great value and benefit to him, were so appreciated and regarded by him, and were no less than would have been rendered by a daughter, "but the same are of such a character that they cannot be readily ad-measured and are not capable of exact ascertainment or valuation"; that at the time of executing the agreement the decedent "was a widower and childless and so continued until his death, that he had no relatives who resided with him or who were dependent upon him in any manner or to whom he owed any legal or moral duty to care for them or provide for them out of his means or estate, or who were in any manner entitled to look to him for pecuniary aid, or who had any moral claim to be considered as the objects of his testamentary bounty"; that his nearest relatives were a sister and two brothers, all of the half blood, nephews and nieces, grandnephews and grandnieces, and more remote collateral relatives; that "none of said relatives lived on terms of intimacy or cordiality with said George F. Gilman, but, on the contrary, all of them had for many years been estranged from him, and many of them were bitterly hostile to him"; that the decedent failed and neglected to make a will confirming his agreement with the plaintiff and died intestate, owning upward of one and a half million dollars.

The appellant, according to the allegations of the complaint, is the daughter of a deceased sister of said George F. Gilman. The first ground of her demurrer is that the

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amended complaint does not state facts sufficient to constitute a cause of action against her. Her first point in this regard is that the allegations of the complaint are insufficient to establish any claim on the part of the plaintiff as an adopted daughter of the decedent. This is apparently conceded by the respondent and, therefore, need not be considered.

The appellant further contends that the agreement is void for uncertainty and that the circumstances are not such as would justify a court of equity in enforcing specific performance. Upon demurrer where, as here, the demurrer is upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it must be assumed that all of the facts alleged in the complaint, as well as those that may be inferred or implied therefrom by reasonable and fair intendment, are true (*Coatsworth v. Lehigh Valley R.R.*, 156 N. Y. 451). Tested by this rule the complaint, we think, sufficiently states an agreement "reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made". (*Stokes v. Stokes*, 148 N. Y. 716; 3 *Pomeroy's Equity Jurisprudence*, sec. 1405) to give a court of equity jurisdiction to compel specific performance. She does not expressly allege that she accepted the agreement and remained with the decedent pursuant thereto; but she avers that the decedent "entered into" the agreement with her and that she fully performed it on her part. Therefore, it may fairly be inferred, under the rule stated, that she agreed with the decedent to do the things upon which his agreement to leave her the property was conditioned. Nor can it be said on the allegations of this complaint that the contract was void as against public policy. The testator was a widower and had no issue, and was on unfriendly terms with all his collateral relatives. It would, therefore, have been competent for him to have given all his property to the plaintiff during his lifetime or to have left it all to her

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by will. It was equally competent for him to make a valid agreement with her for a sufficient consideration, of the nature of that alleged which is incapable of exact money value, that she should receive all of his property upon his death, and if a definite agreement, either parol or in writing, to that effect be clearly shown by satisfactory evidence, a court of equity may, in its discretion, decree a specific performance thereof where it does not appear that the enforcement of the agreement would be "unfair, inequitable or unjust" (*Winne v. Winne*, 166 N. Y. 263; *Healy v. Healy*, 55 App. Div. 315, aff'd 166 N. Y. 624; *Gates v. Gates*, 34 App. Div. 608; *Brantingham v. Huff*, 43 App. Div. 414; *Parcell v. Stryker*, 44 N. Y. 480). Contracts of this character, especially resting in parol, are justly regarded with suspicion, and the evidence adduced to establish them should be carefully scrutinized to avoid the perpetration of fraud upon the lawful heirs (*Shakespeare v. Markham*, 10 Hun, 324, aff'd 72 N. Y. 400; *Gall v. Gall*, 64 Hun, 600 aff'd 138 N. Y. 15; *Mathews v. Mathews*, 62 Hun, 111).

It cannot be said as matter of law that performance of this agreement should not be enforced. That question will rest in the first instance in the sound discretion of the court of equity to be exercised upon the evidence as presented upon the trial. The rule applicable to the specific performance of such agreements is well stated by Martin, J., in *Winne v. Winne* (*supra*), as follows:

"The right to the specific performance of a contract rests in judicial discretion and circumstances, and in the exercise of a sound discretion (*Seymour v. Delancey*, 6 Johns. ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Conger v. N. Y. W. S. & B. RR.*, 120 N. Y. 29; *Stokes v. Stokes*, 155 N. Y. 590).

Therefore, in cases of this character, where it appears for any reason that the enforcement of the agreement would be unfair, inequitable or unjust, the remedy should be denied. Each case must be governed by its own facts and circumstances, and unless the proof discloses a situation where

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good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded." The complaint shows that there are conflicting claims with reference to the residence of the decedent; it being claimed by some of the defendants that he was a resident of Connecticut, and by others that he was a resident of New York. That does not affect the question now presented. It is alleged that he resided in this State; but whether he did or not, if she establish the agreement, the court may at least award to her the property within its jurisdiction.

The second ground of demurrer is that a cause of action against the decedent's administrators for a breach of his contract is united with a cause of action against his heirs. The complaint shows the appointment of an administrator in New York and another in Connecticut, and they are made parties defendant. The complaint states but a single cause of action based upon the agreement made by the decedent with the plaintiff. The plaintiff has joined the administrators and the heirs and all parties claiming an interest in either the real or personal estate. It cannot be said that causes of action have been improperly united when only one cause of action is stated. The suit being in equity, it is not essential that all the parties should be interested in the same way or affected alike by the judgment demanded. The important question of fact is the establishment of the contract; and the same evidence that will establish it as to real property will establish it as to the personal property. It was proper to unite all of the parties in interest to avoid a multiplicity of suits and have adjudication that would determine the question as to all parties interested in the estate. Moreover, this has been the practice in this class of actions. The object of the action is to reach the property of the decedent, both real and personal, and to have the same delivered to the plaintiff and to have the claims of those asserting title or interest thereto adjudicated.

A third ground of demurrer is interposed which does not

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seem to conform to the provisions of the Code. The appellant's counsel in his points interprets it as a demurrer upon the ground of multifariousness. This is not a ground of demurrer authorized by the Code. It is stated in the third ground of demurrer that the complaint alleges a cause of action against the administrators in New York, against the administrators in Connecticut, against the defendants Hartford and Smith, who were partners of the decedent, and against the heirs; and that these causes of action relate to separate and distinct matters. If this is to be construed as demurrer upon the ground that causes of action have been improperly united, it has already been answered. Whether or not a cause of action is stated against all of the other defendants does not concern the appellant. She is an heir at law of the decedent and a cause of action is sufficiently stated against her. A demurrer will lie for a defect of parties, plaintiff or defendant (Code Civil Procedure, sec. 488, sub. 6), and upon the ground that there is a misjoinder of parties plaintiff (*id.*, sub. 5), but a demurrer will not lie for misjoinder of parties defendant. A defect of parties for which a demurrer lies means a non-joinder and not a misjoinder of parties plaintiff or defendant (New York, etc., *v. Schuyler*, 17 N. Y. 592; *Palmer v. Davis*, 28 N. Y. 242; *Potter v. Ellice*, 48 N. Y. 321).

It follows, therefore, that the interlocutory judgment should be affirmed, with costs; but with leave to appellant to answer upon payment of the costs of the appeal and of the demurrer.

All concur.

Benjamin Blum, Pltf.-Aplt., v. Clara Dabritz et al., Dfdt.-Resp.

**BENJAMIN BLUM, PLAINTIFF-APPELLANT, v.
CLARA DABRITZ, AS EXECUTRIX OF THE LAST
WILL AND TESTAMENT OF EDWARD DABRITZ,
DECEASED, ET AL., DEFENDANT-RESPONDENT.**

**NEW YORK SUPREME COURT—APPELLATE TERM—JAN-
UARY, 1903.**

§ 1815.

*Demurrer of Defendant, as Executrix, Sustained—Complaint Dis-
closes Naked Tort for Which Estate is Not Liable.*

For a tort committed by an executor he is liable individually and not in his representative capacity.

This is so where a tort is committed by an executor in the continuation of the conduct of the business of the testator under the provisions of the will.

Even the contracts of a business carried on by an executor under authority of the will are his individual contracts.

(Decided January, 1903.)

Appeal by plaintiff from interlocutory judgment of the City Court and the order on which it was entered sustaining the demurrer to plaintiff's complaint interposed by defendant as executrix.

Blandy, Mooney & Shipman (Andrew J. Shipman of counsel), for appellant.

Christian G. Moritz, for respondent.

FREEDMAN, P.J.—The complaint shows that the plaintiff, after having occupied for a number of years certain premises under a lease made to him by Edward Dabritz, the testator of defendant, which lease contained a covenant of quiet

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enjoyment, was before the expiration of said lease wrongfully and illegally dispossessed and ejected from the demised premises by the defendant, claiming to act as executrix of her testator; that the defendant accomplished this result by means of summary proceedings instituted by her as landlord against the plaintiff as tenant and one alleged under-tenant; that said proceedings were wholly void; that the plaintiff had no notice or service in said proceedings; that the final order and warrant of removal were granted against him by default; that on his appeal said final order was reversed and a new trial ordered; that upon such new trial a final order was again granted against him; that on his appeal the last mentioned final order was reversed and the summary proceedings and defendant's petition were dismissed, with costs; that restitution was denied to plaintiff on the ground that the defendant immediately after the plaintiff's removal, had leased said premises to another tenant for the remainder of the term; and that by reason of said wrongful and unlawful acts the plaintiff sustained certain specified damages. The complaint further alleges the death of Edward Dabritz, leaving a last will and testament; the probate of said will, the appointment of the defendant as executrix thereof, and also that by said will the defendant was made the sole residuary legatee and devisee, including the premises in question.

Upon these allegations the plaintiff's complaint proceeds against the defendant individually and as executrix, and the defendant answered individually, but demurred as executrix upon the ground that the complaint does not state facts sufficient to constitute a cause of action against her as executrix.

This demurrer was sustained by the City Court and judgment entered thereon, and the plaintiff appeals to this court.

The action is not one for a breach by the defendant as executrix of the covenant of peaceable and quiet possession.

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Nor does the complaint show that the summary proceedings were instituted by the defendant as executrix, because of a violation by the plaintiff of some of the terms or conditions of the lease.

The complaint is for a naked tort, viz., for a wrongful and illegal eviction under color of proceedings wholly void and without notice to plaintiff. It is therefore for a tort for which the estate of Edward Dabritz is not liable. The rule is well settled that for a tort committed by an executor he is liable individually and not in his representative capacity (*Watson v. Moriarty*, 59 N. Y., Suppl. 73, 11 Am. and Eng. Enc. of Law, 2d ed. 942).

And this is so where a tort is committed by an executor in the continuation of the conduct of the business of the testator under the provisions of the will (*McCue v. Finck*, 46 N. Y. Suppl. 243).

Even the contracts of a business carried on by an executor under authority of the will are his individual contracts (*Willis v. Sharp*, 113 N. Y., at p. 591, 11 Am. and Eng. of Law, 2d ed., 974).

The case, therefore, does not fall within the special provisions of section 1815 of the Code of Civil Procedure, because the facts alleged do not show a liability in a representative capacity, nor make it uncertain whether it so exists, or is against the executrix individually; on the contrary, it clearly appears that whatever liability does exist is against the defendant individually.

The words "individually and as executrix" cannot be treated as surplusage, for the reason that the body of the complaint and the brief of plaintiff's counsel upon this appeal both show that the pleader intended to hold the defendant liable in both capacities.

The judgment should be affirmed, with costs.

All concur.

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NOTE.—CAUSES OF ACTION—JOINDER OF PERSONAL AND REPRESENTATIVE.

Section 1815 of the Code of Civil Procedure provides for the bringing of an action against any executor or administrator personally and in his representative capacity in instances:

1. Where the complaint sets forth a cause of action against him in both capacities, but it is uncertain in which capacity.

2. Where the complaint sets forth two or more causes of action in different capacities, all of which grow out of the same transaction, or transactions, connected with the same subject of action, do not require different places or modes of trial, and are not inconsistent with each other.

It is proper, however, to bring in all the parties to be affected and all the facts necessary to give the plaintiff adequate and complete relief should be alleged. *Donnelly v. Lambert*, 62 App. Div. 189.

Likewise is it proper to join the executor or administrator in both capacities in an action to charge real estate in the hands of a devisee. *De Crano v. Moore*, 50 App. Div. 361-365; S. C. 30 Misc. 303.

Where, therefore, the complaint sets for facts to sustain it against the executor or administrator in either capacity, a demurrer to it will not be sustained. *Jones v. Brooke*, 52 App. Div. 521-526.

But a complaint cannot unite a cause of action against an estate and the defendants as executors or administrators individually.—*McADAM, J. McCue v. Finck*, 2 N. Y. Month Law Record, 125-126.

George F. Hunt, etc., Respondent, v. Dora Sullivan, Appellant.

GEORGE F. HUNT, AS ADMINISTRATOR OF THE
GOODS, CHATTELS AND CREDITS WHICH WERE
OF ELLA W. HUNT, DECEASED, RESPONDENT, v.
DORA SULLIVAN, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—SECOND JUDICIAL
DEPARTMENT—JANUARY, 1903.

§ 779.

*Payment of Costs of Unsuccessful Motion Before Being
Heard in a Renewal.*

Costs and disbursements of an appeal from an order are "costs of motion" within the meaning of section 779 of the Code, staying all proceedings on the part of the party required to pay the costs, without further direction of the court, until the payment thereof.

Independently of the requirements of the Code, a due exercise of the discretion vested in the court would dictate generally that a litigant should be required to pay the costs of an unsuccessful motion before being heard on a renewal.

The affidavit, on which an order for the examination of a party before trial is founded, is deficient, where it fails to disclose any valid reason why the examination should not be had at the trial instead of before it.

(Decided January, 1903.)

Appeal by the defendant from that portion of an order of the Supreme Court which denies a motion to vacate an order for the examination of defendant before trial, entered in the office of the Clerk of the County of Kings, on the 30th day of October, 1902.

Ira Leo Bamberger, for appellant.

A. E. Richardson, for respondent.

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HIRSCHBERG, J.—Two reasons are assigned why the order should be reversed, viz.: the insufficiency of the affidavit on which the order for the defendant's examination was granted, and the fact that the plaintiff was stayed by the terms of section 779 of the Code of Civil Procedure because he had not paid the costs imposed by this court on appeal from a prior order for the examination of the defendant.

The plaintiff had procured an *ex parte* order for the examination of the defendant before trial and the defendant appealed to this court from an order denying her motion to vacate such order. We held that the affidavit on which the order for the examination was granted was defective on the authority of *Cook v. New Amsterdam R. E. Ass'n* (85 Hun, 417), and that the order for the defendant's examination should be vacated and the order denying the motion to vacate reversed. (See *Hunt, adm'r, v. Sullivan*, 69 App. Div. 617). The order entered upon that decision only provided that the order appealed from should be reversed with \$10 costs and disbursements. Thereafter the plaintiff obtained another order *ex parte* requiring the defendant to submit to examination before trial, and vacating the former order for such examination. Under the circumstances the order made by this court on the former appeal may be treated as if made in strict compliance with the terms of the decision.

The plaintiff was stayed by section 779 of the Code (*supra*) by his failure to pay the costs and disbursements of the appeal. This was the construction placed upon that section by the General Term in both the First and Second Departments, in holding that the costs and disbursements of an appeal from an order made at Special Term are "costs of a motion" within the meaning of the Code (*Phipps v. Carman*, 26 Hun, 518; *McIntyre v. German Savings Bank*, 59 id. 536; see, also, *Cohu v. Husson*, 57 Super. Ct. 222). Independently of the requirements of the Code, a due exercise of the discretion vested in the court would dictate generally that a litigant should be required to pay the costs of an unsuccessful motion

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before being heard in a renewal (*Barton v. Speis*, 73 N. Y. 133; *Spaulding v. Am. Wood Board Co.*, 58 Hun, 314; *Sprague v. Bartholdi Hotel Co.*, 68 id. 555; *Patchen v. D. & H. C. Co.*, 62 App. Div. 543, 545).

The affidavit on which the second order for the defendant's examination is founded is deficient in not showing facts which render such examination necessary, and especially in failing to disclose any valid reason why it should not be had at the trial instead of before it.

The order appealed from should be reversed, with \$10 costs and disbursements, and the order for defendant's examination vacated, with costs.

All concur.

NOTE.—MOTION COSTS—HOW COLLECTED.

SET OFF.—The court has power to set off interlocutory costs against the judgment finally rendered in an action. The fact that the order granting the costs was made after the proponent was entered does not affect the question. *Hoyt v. Godfrey*, 3 Civ. Pro. 118.

Attorney's lien prevents set off. *Place v. Hayward*, 8 Civ. Pro. 352; *Ward v. Ward*, 67 App. Div. 121.

Costs of appeal from an order vacating an execution against the person are motion costs and enforceable by an execution issued against the personal property. *Carrigan v. Washburn*, 18 Civ. Pro. 79.

Attorney's lien enforced. *Branth v. Branth*, 15 Civ. Pro. 28, 31.

MOTION COSTS IN ACTIONS AND SPECIAL PROCEEDINGS.

Motion costs in actions and special proceedings can be collected by execution against the personal property issued under section 779, Code Civil Procedure.

The establishment of a method of collection impliedly precludes their collection in any other way. *Valiente v. Bryan*, 3 Civ. Pro. 358.

STAY.

Non-payment of motion costs acts as a stay of all proceedings, except to review. *Nat. Bk. of Port Jarvis v. Hausee*, 7 Civ. Pro. 350; *Mooney v. Ryerson*, 8 Civ. Pro. 435; *Cohn v. Husson*, 17 Civ. Pro. 434; *MacWhinnie v. Cameron*, 14 Civ. Pro. 168.

STAYS ON APPEAL.

Gardener v. Eldred, 21 Civ. Pro. 221.

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WHEN NOT A STAY.

Costs of an appeal from an order granting a new trial on the merits are not costs of motion or a sum of money directed by an order to be paid.

Their non-payment does not stay the proceedings of the party against whom they are awarded. *Eisenlord v. Clum*, 17 Civ. Pro. 147.

See *Per Contra. McIntyre v. German Savings Bk.*, 20 Civ. Pro. 209.

Motion for leave to enter final proponent dismissing the complaint which judgment the defendant declines to enter, although entitled to do so, is not stayed for non-payment of motion costs. *TenEyck v. Town of Warwick*, 24 Civ. Pro. 6. See extension to this case, p. 9.

COSTS TO ABIDE THE EVENT AND UPON CONDITION.

Where an order is made with costs "to abide the event," the costs so awarded cannot be set off, as such costs are conditional upon the party's success. Nor is their character in any manner changed by this section (779 Code Civil Procedure) providing for the set off of costs awarded to abide the event in certain cases. *Murphy v. Gold & Stock Tel. Co.*, 18 Ci Pro. 43.

Imposed as a condition of postponing a trial. *Hewett v. Cook*, 75 App. Div. 239.

JUDGMENT FOR MOTION COSTS CANNOT BE ENTERED.

An entry of judgment for costs in their nature interlocutory is wholly unauthorized. They are practically motion costs within the meaning of this section (779) Code of Civil Procedure. *Quinn v. Waiter*, 18 Civ. Pro. 122.

But an interlocutory judgment may provide for execution for the collection of the costs. *Brassington v. Rohrs*, 23 Civ. Pro. 146-150.

Order of restitution is not covered by this section (779 Code Civil Procedure). *Devlin v. Honman*, 28 Civ. Pro. 127; *Newell v. Hall*, 74 App. Div. 278.

But it appears that an order directing a defaulting purchaser at a foreclosure sale should be entered as a proponent and enforced by execution. *Leslie v. Saratoga Brewing Co.*, 33 Misc. 118-120.

An interlocutory judgment entered upon a demurrer is properly enforced for collection of costs by issuance of execution under this section (779 Code Civil Procedure), *Bernheimer v. Hartmayer*, 34 Misc. 346-347.

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WILLIAM H. ZELTNER, INDIVIDUALLY AND AS EXECUTOR, ETC., RESPONDENT, v. THE HENRY ZELTNER BREWING COMPANY, RESPONDENT.
WILLIAM B. SUTHERLAND, AS RECEIVER OF THE HERNY ZELTNER BREWING COMPANY, RESPONDENT; YORKVILLE BANK, APPELLANT.

SUPREME COURT—APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT—JANUARY, 1903.

§§ 1810 SUBD. 3, 2423.

*Construction Subdivision 3, Section 1810, Code Civil Procedure—
Resignation of Officers and Directors of Corporation for
the Purpose of Procuring Receivership.*

Subd. 3, sec. 1810 of the Code of Civil Procedure does not authorize the appointment of a receiver of a corporation where the officers and directors resign for the purpose of procuring a receivership. There is no provision of law warranting the appointment of a receiver under such circumstances.

The officers and directors of The Henry Zeltner Brewing Company resigned for the purpose of permitting an action to be brought for the appointment of a receiver, and a stockholder brought an action under subd. 3 of sec. 1810 of the Code, praying for the appointment of a receiver upon the ground that the corporation had no officer empowered to hold the assets.

Held, that the resignations were unlawful and ineffective, and that the officers and directors continued to be responsible for the performance of their trust and were empowered to hold the assets.

Smith v. Danzig, 64 How. Pr., 320, overruled.
(Decided January, 1903.)

Appeal by the Yorkville Bank from an order made in an action brought by William H. Zeltner against the Henry

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Zeltner Brewing Company, denying a motion to vacate an order appointing a receiver of the defendant corporation and enjoining the Yorkville Bank from prosecuting certain actions against said corporation.

Moses Weinman (*Abraham Benedict* with him on the brief), for appellant.

Henry A. Forster (*Frederick P. Forster* with him on the brief), for respondents.

WILLARD BARTLETT, J.—The receiver was appointed under subdivision 3 of section 1810 of the Code of Civil Procedure, which provides for a receivership in an action brought by the attorney-general, "or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same."

The action was brought by William H. Zeltner as an individual stockholder in the Henry Zeltner Brewing Company, and as the executor of a deceased stockholder. The complaint alleged that the condition of the business of the corporation was such that it was unable to obtain ready money to meet its obligations, and that there was great danger that, by reason of suits against it, its property would be seized and sacrificed, instead of being equitably and fairly distributed among its creditors and stockholders. It further alleged that the officers of the corporation had determined that the property of the defendant should forthwith be placed in the hands of the court to be administered, and that accordingly the directors and president and treasurer had resigned their offices so that their positions were all vacant and unoccupied, and no officer existed authorized or empowered to hold any of the assets or property of the corporation. Upon this complaint and affidavits in support of it, showing that all the officers of the company except the secretary had resigned in order to bring the case within the letter of subdivision 3 of section 1810 of the

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Code of Civil Procedure, the motion for a receivership came on to be heard and was granted without any opposition in behalf of the corporation. The order appointing a receiver contained an injunction restraining all creditors from proceeding to force any claims which they might have against the corporation. This injunction was operative upon the Yorkville Bank, which had already commenced two actions in the Supreme Court against the corporation upon promissory notes amounting to \$10,000, and it is this feature of the order which gave the Yorkville Bank the requisite status to move to vacate the order and which enables it to prosecute the present appeal. The record indicates that no answer has ever been put in in behalf of the defendant corporation, and that the receiver, ever since his appointment on the 7th day of February, 1902, has carried on the business of the corporation secure from any interference on the part of its creditors.

The motion to vacate the receivership order was denied on the ground that no corporate action was necessary to make the resignation of the officers effective, and on the authority of the Special Term decision in *Smith v. Danzig* (64 How. Pr. Rep. 320, 330), in which Mr. Justice Pratt expressed the opinion that the directors of a corporation might properly resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors. While the general proposition is undoubtedly true that the acceptance of a resignation is ordinarily not essential to its effectiveness (*Noble v. Euler*, 20 App. Div. 548), it does not follow that the officers of an incorporated organization can divest themselves of all authority over its property and all obligation to care for that property simply by resigning in a body in order to make out a case for judicial action under the provision of the Code which has been cited. Mr. Morawetz, in his well-known work on corporations, says: "It seems clear, also, that directors cannot terminate their agency or accept the resignation of

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others if the immediate consequence would be to leave the interests of the company without proper care and protection" (1 Morawetz on Corporations, sec. 563). This statement of the law was approved by the General Term of the First Department in *Carnaghan v. The Exporters' & Producers' Oil Co.* (32 N. Y. St. Rep. 1117, 1121). If such action on the part of corporate officers has been attempted in the present case can be sanctioned by the law, the effects would be most unfortunate. It would follow that the officers of a corporation having charge of millions of dollars' worth of property could at any time, by the simple act of resignation, relieve themselves of all responsibility for its care or protection, and leave it to become the prey of any evil-disposed person who might seize it. We are unwilling to admit any construction which could lead to such a result. In our opinion the wholesale resignation of the officers of the Henry Zeltner Brewing Company did not free them from the obligations which previously rested upon them in regard to the custody of that property until other officers should be duly appointed to care therefor. They still remained officers "empowered to hold the same" within the meaning of subdivision 3 of section 1810 of the Code of Civil Procedure.

The opinion of Mr. Justice Pratt to the contrary, in *Smith v. Danzig (supra)*, was evidently based upon the idea that such action should be approved because the law furnished no other remedy in the case of an insolvent corporation whose affairs were growing worse every day and whose remaining property was liable to be wasted, leaving the bulk of its creditors unpaid. No such reason now exists, in view of the present provisions of law relating to the voluntary dissolution of a corporation by which provision is made, if necessary, for the immediate appointment of a temporary receiver in case the corporation is insolvent (Code Civ. Pro., sec. 2423).

The cases in which a corporation would have no officer

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empowered to hold its assets so that a suit might be brought under subdivision 3 of section 1810 of the Code to preserve such assets would ordinarily be those of foreign corporations having property within this jurisdiction, but no officer authorized to hold such property here (See *Wilkinson v. The North River Construction Co.*, 66 How. Pr. Rep. 423, opinion by Vann, J.). In the case of a domestic corporation it is difficult to see how the subdivision could apply unless upon the sudden physical incapacity or decease of all the directors in office.

But however this may be, we are of opinion that the resignations in the present case did not deprive the directors of their authority over the corporate property, or release them from their obligation to care for the same until their successors should be duly chosen. They could not lawfully, by the expedient of resigning in a body, enable a stockholder, who otherwise could not maintain an action for the purpose, to institute a suit for the dissolution of the corporation, or procure a receivership to carry on the business indefinitely for his benefit, and in the meantime hold off the claims of creditors having valid demands against the company's assets.

Although the order under review, so far as it appoints a temporary receiver, affects the present appellant only indirectly, it has been necessary to consider the validity of that portion of the order as bearing upon the part containing the injunction which does affect the Yorkville Bank in common with all other creditors. As was held by Judge Vann, in *Wilkinson v. The North River Construction Co.* (*supra*), where the jurisdiction exists to appoint a receiver under subdivision 3 of section 1810 of the Code of Civil Procedure, in an action brought by a stockholder to preserve the assets of a corporation, the court, in the exercise of its inherent power, may, by a general order, restrain all creditors from commencing or prosecuting suits against the corporation of whose property the court, through its officers, has

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taken possession for the benefit of all. Conversely, no authority to grant such a general restraining order exists where there is no jurisdiction to appoint the receiver. Such, we think, is the case here.

The order appealed from should be reversed, and the order appointing the receiver should be modified so as to relieve the Yorkville Bank from the operation of the injunction or stay contained therein, and permit said bank to prosecute its claims against the Henry Zeltner Brewing Company to judgment, and to enforce any judgments it may obtain against the property in the hands of the receiver.

All concur.

**MARY POTTS, APPELLANT, v. FRED N. DOUNCE, AS
EXECUTOR, ETC., IMPLEADED, RESPONDENT.**

COURT OF APPEALS—JANUARY, 1903.

§ 758.

*Joint Promissory Note—Construction of Section 758,
Code Civil Procedure.*

To maintain an action at law against the executor of one of the makers of a joint promissory note, the plaintiff must allege and prove the insolvency of the surviving makers, or their inability to pay. This rule applies, as well, to partnership notes.

Section 758 of the Code, which provides that the estate of a joint contractor shall not be discharged by his death, but that his personal representative may be brought in as a party defendant, did not affect the procedure, or dispense with the necessity of alleging and proving, as formerly, the inability to collect of the survivors.

(Decided January, 1903.)

Mary Potts, Appellant, v. Fred N. Dounce, Respondent.

Appeal from a judgment of the Appellate Division, Third Department, affirming a judgment entered upon the report of a referee.

E. J. Baldwin and *Cassius A. Phillips*, for appellant.
Judson A. Gibson, for respondent.

GRAY, J.—This was an action upon a promissory note, made in the following form: "\$1,000.00. Elmira, N. Y., May 21, 1892. Two years after date we promise to pay to the order of Mary Potts one thousand dollars, with interest, value received. Interest payable semi-annually. (Signed) Francis E. Baldwin, Mary S. Daggett, Julia E. Smith, Ophelia C. Dounce." The complaint simply alleged the making of the note; the death of Ophelia C. Dounce, one of the makers, and the issuance of letters testamentary to the executor named in her will, who is joined as a defendant with the three survivors of the makers, and, finally, the non-payment of the note. The only answering defendant was the executor, who, *inter alia*, alleged that the note in suit was a joint and not a several note; that upon her death the obligation of Ophelia C. Dounce was discharged and that her executor was improperly joined in the action. Upon the opening of the trial, counsel for the executor moved for the dismissal of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. At the conclusion of the trial, a similar motion was made, with the additional ground stated that the evidence failed to make out a cause of action against the executor and showed that he was improperly joined as a party defendant. No application was made to amend the complaint. The referee, before whom the case was tried, upon the issues raised by the executor's answer to the complaint, found, among other facts, that the note was made to the plaintiff upon her advancement to the makers of the moneys, for the benefit of a corporation, of which they were officers and trustees. He

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decided that upon the pleadings and the facts, the executor was entitled to a dismissal of the complaint and directed judgment accordingly. The judgment entered upon the referee's decision was unanimously affirmed and the plaintiff has appealed to this court.

The question which comes here is whether the executor of one of the deceased makers of the note was properly joined as a defendant. The theory of the decision below, and, in my opinion, it is correct, was that, as this was a joint note of the makers, it was necessary to the sufficiency of the plaintiff's cause of action against the executor that she should allege in her complaint and prove upon the trial the insolvency of the survivors, or the inability to recover against them. The position of the appellant, as I view it, is that section 758 of the Code of Civil Procedure, as amended in 1877, has changed the rule with regard to joint debtors and now authorizes the maintenance of an action against the personal representatives of a deceased joint debtor, in the same way as though the contract creating the liability had been joint and several. Section 758 is enacted in that part of the Code which relates to "Proceedings upon the death or disability of a party, or the transfer of his interest," and provides that in case of the death of one or two or more plaintiffs, or defendants, if the entire cause of action survives to, or against, the others, the action may proceed in favor of, or against, the survivors; "but the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter." While this section, by its place in the Code, is applicable to the case of the death of a party pending the action, it must, nevertheless, be regarded as making a material alteration in the law and as imposing a liability where none existed before (*Randall v. Sackett*, 77 N. Y. 480). But there is no reason for holding that the section dispenses with

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the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors, when joining the personal representatives of the deceased debtor as defendants in an action upon the contract. The section creates the legal liability; but it does not prescribe the procedure. To hold otherwise would be to lose sight of an essential distinction between the engagement of a joint debtor and that of a joint and several debtor. That remains as it always has been. Upon the death of the former, the survivors become principal debtors, and it is then their duty to discharge the obligation assumed, although they would have the right to compel contribution from the estate of the deceased. In this case the deceased maker was a joint debtor and not a mere surety. At common law her death would have terminated her liability, but while no action at law could have been brought against her estate, as she was a joint debtor, equity, if an inability to collect from the survivors were shown, would have allowed a recovery against the estate (1 Parsons on Contracts 30; *Grant v. Shurter*, 1 Wend. 148; *Richardson v. Draper*, 87 N. Y. 337). Section 758 of the Code, now, by continuing the legal liability of the estate of the deceased, enables that liability to be enforced in an action at law. It effects directly what formerly equity intervened to accomplish. But while the legal rule of liability has been changed, the rule of procedure is not, and when the personal representatives of the deceased joint debtor are directly proceeded against at law the plaintiff should still allege and prove the insolvency or inability to collect of the survivors. The principle of liability of debtors upon a joint contract should make that proposition sufficiently clear in my opinion (see *Barnes v. Brown*, 130 N. Y. 372; *First Nat. Bank v. Lenk*, 32 N. Y. S. R. 191, *aff'd* 123 N. Y. 638; *Merrill v. Blanchard*, 7 App. Div. 167, *aff'd* 158 N. Y. 682). The principle is the same whether the contract be an ordinary joint undertaking or one of partnership. In *Pope v. Cole* (55 N. Y. 124), which was for

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the recovery of a partnership debt against the executrix of a deceased partner, Judge Grover observed, in his opinion, that "payment of a joint debt, when no partnership between the debtors ever existed, can be enforced out of the estate of one of the deceased debtors under the same circumstances only as in the case of partners; that is, by showing an inability to collect the debt from the survivor." In *Barnes v. Seligman* (affirmed here, *supra*) the question was discussed by the General Term of the First Department (55 Hun, 339, 349) whether there was any limitation of the doctrine to cases of partnership contracts. It was held, upon the authority of *Pope v. Cole*, that there was no reason for the limitation, and that the principles upon which the cases proceeded, which held that proof of insolvency under proper averments was necessary in order that a recovery might be had against the representatives of the deceased partner, make no such distinction as was claimed, inasmuch as "that it was not a legal right which is attempted to be enforced, but an equitable one." I perceive no legal distinction between survivorship as between co-partners and survivorship as between joint debtors.

I think we should hold that, while section 758 creates a liability which did not exist at common law, it does not affect the procedure, and that the remedy to enforce the liability is to be pursued upon such pleading and proofs as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in the action against the survivors upon the contract.

I think the judgment below was right and should be affirmed, with costs.

PARKER, Ch.J.; O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment affirmed.

Wm. M. Hoes, etc., Resp., v. The N. Y., N. H. & H. RR. Co., Appt.

**WILLIAM M. HOES, AS PUBLIC ADMINISTRATOR
OF THE GOODS, CHATTELS AND CREDITS OF
GEORGE DEAN, DECEASED, RESPONDENT, v.
THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, APPELLANT.**

COURT OF APPEALS—FEBRUARY, 1903.

§ 2473.

*Collateral Attack Upon Letters of Administration Issued to Public
Administrator—Construction Sections 1780 and 2473,
Code of Civil Procedure.*

The plaintiff, as public administrator, brought action for damages for the death of the intestate against a Connecticut corporation upon a cause of action arising in Connecticut. The decedent left no assets in the State of New York. He died a resident of Connecticut, and his next of kin were all non-residents of New York. After his death his watch and chain, valued at \$25, were, upon the advice of counsel, brought within the State of New York, and, upon a petition to the Surrogate's Court, under chapter 229 of the Laws of 1898, alleging that since the death of the intestate certain of his assets had arrived within the jurisdiction and remained unadministered, letters of administration were issued to the plaintiff. It appeared that the only purpose of bringing the watch and chain into New York and issuing the letters of administration to the public administrator was to provide a resident plaintiff who might bring this action against a foreign corporation upon a cause of action arising outside the State as permitted by section 1780 of the Code of Civil Procedure.

Held, that the device so employed for the purpose of conferring upon the Supreme Court jurisdiction to try a cause of action having its origin in the State of Connecticut where the real controversy was between a corporation and residents of that State involved legal fraud and collusion, and that under section 2473 of the

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Code of Civil Procedure it was open to the defendant to attack collaterally the decree of the Surrogate adjudging that the letters of administration issue.

Assets of a decedent brought into this State in the manner and for the purpose above described do not, as a matter of law, constitute assets which "shall arrive within the County of New York after his death" within the meaning of chapter 229 of the Laws of 1898, relating to the office of public administrator, nor do they constitute property "which has since his death come into the State and remains unadministered" within the meaning of section 2476 of the Code of Civil Procedure, defining the jurisdiction of the Surrogates' Courts. These provisions must be construed as meaning that the assets must "arrive" or "come into" the State in good faith, in due course of business, and not for such a purpose as appeared in this case.

Whether the Public Administrator of New York County by virtue of his office or by virtue of letters of administration has, in any case, power to bring an action of this character, *QUAERE*.
(Decided February, 1903.)

Appeal from a judgment of the Appellate Division, First Department, affirming with a divided court a judgment entered upon a verdict of a jury in favor of the plaintiff; also affirming an order denying defendant's motion to set aside the verdict and for a new trial.

Henry W. Taft, for appellant.

Thomas P. Wickes, for respondent.

BARTLETT, J.—The Public Administrator of the County of New York brings this action against the defendant. The New York, New Haven & Hartford Railroad Company, a Connecticut corporation, to recover damages for its alleged negligence in causing the death of one George Dean, who was killed in a head-on collision while acting as an engine driver on one of the trains.

The jury rendered a verdict in favor of the plaintiff for \$5,000, and the Appellate Division has affirmed the judgment entered thereon with a divided court.

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At the close of the plaintiff's case a motion was made to dismiss the complaint on this ground, among others: "That the public administrator has not the power to commence an action of this kind in this State."

At the close of all the evidence this motion was renewed on the previous and additional grounds: "(6) That the public administrator has no power to bring such a suit as this under the circumstances; (7) that his appointment as administrator with the other persons existing, who were competent to be appointed in that capacity, was null and void; (8) that the letters were null and void because the surrogate was without any jurisdiction upon the undisputed facts; (9) that no written notice was given, such as is required under the Connecticut statutes."

Section 1780 of the Code of Civil Procedure provides when a foreign corporation may be sued. It reads: "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident in one of the following cases only: 1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to the property situated in the State, at the time of the making thereof. 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevined within the State. 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated within the State."

As the defendant is a foreign corporation, the parties all residents of, and the accident occurred in, the State of Connecticut, there was no jurisdiction in the Surrogate's Court of New York to issue letters of administration on the estate of the intestate, unless he died leaving assets in this State or that should come into it after his death.

The appellant insists that the plaintiff has no standing

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in the Supreme Court, because collusion or legal fraud was practised in the Surrogate's Court in obtaining letters of administration, and thus inducing that court to take jurisdiction of the estate of the decedent.

The point is also taken that the public administrator, as such, is without power to maintain this action, and that his authority in the premises is in no way enlarged merely because letters of administration were issued to him.

The counsel for the plaintiff insists that the defendant cannot attack collaterally the decree of the surrogate adjudging that letters of administration issue.

Section 2473 of the Code of Civil Procedure, contained in chap. 18 on Surrogates' Courts and proceedings therein, provides, as to assumption of jurisdiction, as follows: "Where the jurisdiction of a Surrogate's Court to make, in a case specified in the last section, a decree or other determination, is drawn in question, collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, *in the absence of fraud or collusion*, conclusively established, by an allegation in the jurisdictional facts, contained in a written petition or answer, duly verified, used in the Surrogate's Court. The fact that the parties were duly cited is presumptively proved by a recital to that effect in the decree."

It is quite obvious that the only attack the defendant could make upon the surrogate's decree is a collateral one, based on the allegation of fraud or collusion, as it was not a party to the proceeding in the Surrogate's Court, and has no standing therein to make a direct attack.

In the case of *Ferguson v. Crawford* (70 N. Y. 253) the question as to when a judgment may be attacked was thoroughly examined by this court, and the authorities reviewed; it was held that, under the system of practice established by the laws of this State, the want of jurisdiction may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it, and the bare

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recital of jurisdictional facts in the record of the judgment by any court is not conclusive, but only *prima facie* evidence, and may be disproved by extrinsic evidence (*Hood v. Hood*, 85 N. Y. 561, 578; *Freeman on Judgments*, 4th ed., vol 1, sec. 117.)

In *O'Connor v. Huggins* (113 N. Y. 511) the question was discussed as to the binding nature of a surrogate's decree upon the parties of the proceeding. This court said (p. 516): "His adjudication, in the exercise of his general and exclusive jurisdiction, where jurisdictional facts, necessary to the possession of that jurisdiction, appear to have been alleged, and when the necessary parties have been duly cited to appear before him, is not thereafter open to collateral attack. Power to affect the adjudication resides in the court which made it, and in the court to which it may be appealed; but otherwise it is not open to question. This principle, of course, in its application to other parties affected, *implies the absence of fraud or collusion.*"

Throughout the proceedings the defendant has persistently insisted that there was, on the undisputed evidence, collusion and legal fraud in procuring the surrogate's decree of the County of New York, which resulted in the issuing of letters of administration on the estate of the intestate to the public administrator.

Anna Dean, widow of the intestate, was sworn for the defendant and testified as follows: "My husband left property within this State, in New York State. It was a watch and chain. I cannot say how it happened to come here. I do not know who brought it here. I believe he had it on his person at the time he was killed. He did not leave it in this State, I think. I cannot say for sure how it got here. My brother might have got it here or had it sent here. * * * That is the only property that he had in this State."

James F. Noonan testified on behalf of the defendant as follows: "I did bring property of Mr. Dean into this State after he had died. A watch and chain. I brought them

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into this State about three or four months after he died. Mr. Wickes told me to bring it into the State. He did not tell me for what purpose. I did tell my sister that I had brought it into the State. I did not tell her for what purpose. * * * I think he did tell me that he wanted me to bring that watch into the State so as to give foundation for making an application for letters of administration here so suit could be brought here instead of Connecticut. I think that is right. And I think I brought it for that purpose and for no other. I did not take it out of the State immediately after letters had been granted. It is still in the possession of Mr. Wickes. I do not know that it is in Mr. Wickes' possession. I have been informed that it is in the safe of the public administrator."

It further appears that in the record all the personal property of the intestate, wherever situated, did not exceed the sum of \$50, and that the watch and chain brought into this State were of the value of \$25.

Mr. Wickes, here referred to, has acted throughout as counsel for the plaintiff.

We have thus presented, on undisputed facts, a most important question of law.

Is it possible, by a device so simple and transparent as the one here disclosed, to confer upon the Supreme Court of this State jurisdiction to try a negligence action having its origin in the State of Connecticut and between a corporation and residents of that State?

If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry, and impose thereby upon our already overworked courts the obligation to try actions imported from a foreign jurisdiction.

It is well said in *Robinson v. Oceanic Steam Navigation Co.* (112 N. Y. 315, 323) as follows: "The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy; that our courts should not be vexed with litigations between non-resident parties

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over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose or the subject-matter of the litigation is situated within this State."

In view of the clear declaration of the witnesses already quoted, that this trifling article of personal property, not exceeding in value \$25, brought into this State by the advice of plaintiff's counsel, in order to furnish a foundation on which to apply for letters of administration, so that this action could be brought here rather than in the State of Connecticut, we have presented a case of collusion and legal fraud in the proceedings before the surrogate.

We do not regard the counsel for the plaintiff as guilty of actual fraud, for what he did he did openly and with a claim of legal right, but, by an error of judgment, he was led to adopt a course of procedure that amounted to collusion and legal fraud.

It cannot be said, as matter of law, that this effort to create assets in this State brought this case within either the laws of 1898 (chap. 229, sec. 4, subd. 2), being the act in relation to the public administration in the County of New York, or section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts.

The act of 1898 refers to assets which "shall arrive within the County of New York after his death," and the section of the Code referred to speaks of property "which has since his death come into the State and remains unadministered."

These provisions should be construed as meaning that the assets must "arrive" or "come" into the State in good faith, in due course of business, and not for the avowed object of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in, and between residents of, another State.

The plaintiff's counsel points out that in *Matter of Hughes* (95 N. Y. 55) this court sustained the jurisdiction of the

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surrogate based upon assets irregularly brought here. This court in its opinion states that the removal of the assets from the State of Pennsylvania was illegal, but as it had been found that this act was without wrongful intent, that there were no unpaid creditors in Pennsylvania, and that the only persons interested in the distribution of the estate were in New York, the assets would not be returned to the foreign jurisdiction.

In Woerner on the American Law of Administration (2d edition), at page (star) 442, the rule is laid down as follows: "Property brought into the State for collusive purposes, or temporarily, after the owner's death, does not confer jurisdiction to grant administration thereon." (Citing *Christy v. Vest*, 36 Iowa, 285; *Varner v. Bevil*, 17 Ala. 286.)

Our attention has been called to no case in this court involving precisely the question now presented.

It may be safely assumed that this is a pioneer case, in an effort to enlarge the jurisdiction of the courts of this State, and, in view of its fate, will be valuable, not only as a precedent, but a warning.

The learned Appellate Division said in its opinion: "We think, therefore, that at this stage of the litigation, after judgment entered, the discretion exercised by the court in entertaining the action should not be disturbed."

The trial court was confronted by no question of discretion, but by a question of law, resting on undisputed evidence, going to the jurisdiction; the disposition made of that question presents legal error reviewable by this court.

We recognize the hardship imposed upon the widow and next of kin by the reversal of the judgment at this stage of the proceedings, but the grave questions involved of public policy and orderly procedure leave the court no choice.

The counsel for the appellant challenges the power of the public administrator to act under the letters of administration issued to him, and insists that it was no part of his official duty to act as plaintiff herein.

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The decision of this point and others presented on the argument is unnecessary, as the views we have already expressed dispose of this appeal.

The judgment and order appealed from should be reversed and the complaint dismissed, with costs to the defendant in all the courts.

PARKER, Ch.J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment and order reversed.

NOTE.—SURROGATE'S COURT—PRESUMPTION OF JURISDICTION.

There is presumption of jurisdiction where the necessary parties were duly cited or appeared when a decree or other determination is drawn in question collaterally. *Matter of Killan*, 172 N. Y. 547-559; sec. 2473 Code Civil Procedure.

It will be presumed upon collateral attack that the court acted correctly and with due authority where it is not alleged nor proven at the trial that the decree did not contain the recital of due service of the citation. Such recitals are presumptive, and in the absence of fraud or collusion, conclusive evidence. *Sisco v. Martin*, 61 App. 502, 504; *Czech v. Bean*, 35 Misc. 729-731.

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CHARLES O. GATES, APPELLANT, v. WILLIAM M.
DUDGEON, AS EXECUTOR, ETC., OF RICHARD
DUDGEON, DECEASED, RESPONDENT.

COURT OF APPEALS—FEBRUARY, 1903.

§ 1338.

*Sale of Testator's Real Estate—Delegation by Executor of Authority
to Carry Sale Into Execution—Sufficiency of Contract
by Correspondence.*

While an executor may not delegate to another authority to exercise a personal power reposed in him by the will for the sale of the testator's real estate, yet he may, after having exercised his own judgment and discretion with reference to the terms and conditions of the sale, authorize an agent to carry it into execution.

Correspondence between parties, which recite a previous oral conversation and agreement with reference to the sale of real property, and the terms and conditions thereof, is sufficient to satisfy the provisions of the Real Property Law requiring a note or memorandum signed by the parties expressing the consideration, etc., although no formal written contract was executed.

(Decided February, 1903.)

Appeal from an order of the Appellate Division, Second Department, unanimously reversing a judgment entered upon a decision.

David C. Bennett, Jr., for appellant.

Daniel P. Hays, for respondent.

HAIGHT, J.—The order of reversal does not state that the reversal was upon the facts. We must, therefore, assume

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that the facts as found by the trial court remain undisturbed, and that the reversal was upon the law (Code Civ. Pro., sec. 1338).

This action was brought to compel the specific performance of a contract for the sale of real estate. The trial court has found, as facts, that Messrs. Hays, Greenbaum & Hershfield were the duly authorized attorneys for the defendant and that the defendant authorized his said attorneys to execute a contract for the sale of the property in question. It was further found, as a fact, that the said attorneys, on behalf of the defendant, "promised and agreed to sell to the said plaintiff the said real property described in the complaint herein for the sum of \$3,000, and, in consideration of the said promise by the said defendant, the said plaintiff promised and agreed to purchase the said premises at the said sum of \$3,000. And it was mutually promised and agreed by and between the said plaintiff and the said defendant that the deed for said premises should be delivered, and possession of the said premises be given, by the said defendant, and the consideration paid by the said plaintiff, as soon as the arrangements could be made thereto by the attorneys for the respective parties." It was further found as a fact that, after the making of the above-mentioned contract, the defendant gave notice to the plaintiff that he would not fulfil said agreement and would not deliver the deed nor the possession of the premises. The court found, as conclusions of law, that the agreement set forth constitutes a good and valid contract for the purchase and sale of the real property described in the complaint; that there was a note or memorandum of the contract in writing expressing the consideration, subscribed by the lawfully authorized agent of the grantor, sufficient to prevent the contract from being void under the provisions of sec. 234 of the Real Property Law, or any other similar provision of law, and that there was a breach of the contract on the part of the defendant. Judg-

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ment was directed in favor of the plaintiff for the specific performance of the contract.

It is now contended on behalf of the respondent that the order of reversal should be sustained, for the reason that the defendant, who was contracting as the executor under a power given by the will of Richard Dudgeon, deceased, could not delegate the personal trust and confidence imposed upon him by the testator, and that, therefore, the contract made by his attorneys was void. The case relied upon to sustain his contention is that of *Newton v. Bronson* (13 N. Y. 587, 593). The rule, doubtless, is correctly stated by Denio, Chief Judge, in that case. An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised the judgment and discretion with which he has been invested, we know of no authority which prohibits him from delegating to others the performance of his determination in regard thereto. The power of executors and trustees to delegate to this extent seems to be sanctioned by Chief Judge Denio in the case alluded to. In the discussion of this question he says: "It is urged by the defendant's counsel that the contract of sale is void, for the reason that it was made by an agent of the defendant, according to the maxim '*Delegatus non potest delegare*.' The rule of law, no doubt, is that a power of this kind is a personal trust and confidence, which cannot be committed to any other than the grantee or donee of the power (*Berger v. Duff*, 4 Johns. Ch. R. 369). Besides this difficulty the defendant, in his answer, denies that the agents who executed in his name the contract which the plaintiff seeks to enforce had any authority in fact from him to execute it, and the plaintiff has failed to show any power of attorney or other express authority from him to them. The last objection is fully overcome by the ample and repeated acts of acknowledgment and ratification by the defendant of the contract in question in writing as well as

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by parol. The evidence upon this point was quite sufficient to enable the court to decide that the agents were authorized by parol to execute the contract and the parol authority under our statute and under the statute of Illinois, which is identical in its provisions, would be sufficient. The contract must be in writing, but where it is signed by an agent, the power to execute may be by parol," citing numerous authorities. Again he says: "The reason of the maxim '*Delegatus non potest delegare*,' however, is that in the case to which it applies the first constituent is a right to the personal judgment, care and skill of his agent. * * * In determining upon one or the other course he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for, perhaps, that other would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it. The reason fails where the person actually intrusted with the authority has with the full knowledge of the facts ratified the act of one who assumed to act as his agent." It would seem, therefore, that if the executor or trustee, with full knowledge of the facts, should ratify the act of his agent or of the person acting for him as agent, he could, in the first instance, after exercising his own judgment and discretion upon the proposed contract, authorize an agent to carry it into execution. That is precisely what was done in this case. The plaintiff, through his attorney, under date of May 3, 1901, addressed a letter to the defendant, in which he offered to purchase the property in question for a sum specified. The defendant concedes that he received that letter and that he took it to his attorney and told him that his title rested on adverse possession, and on being advised by his attorney that he should ascertain whether the proposed purchaser would take that kind of a title, he left the letter with his attorney,

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directing him to make answer thereto. Other evidence was produced on behalf of the plaintiff tending to show that the defendant had himself exercised his own judgment in determining the amount for which the premises should be sold, and that he had authorized his attorneys, Messrs. Hays, Greenbaum & Hershfield, to close the transaction. We, therefore, conclude that the power delegated to his attorneys did not involve his judgments and discretion and that, therefore, the contract entered into by them for him was valid.

It is further contended on behalf of the respondent that there was no valid contract entered into by him or his attorneys to sell the property described in the complaint. There was no formal written contract. What there is of the transaction is disclosed by the letters that passed between the parties. The first of these letters, as we have seen, bears date May 3, 1901, and was written by Mr. Tappan, the attorney for the plaintiff, and is addressed to Mr. Dudgeon, the defendant. From it it appears that the plaintiff and defendant had had previous oral conversations with reference to the purchase of this property. In it he says: "Mr. Charles O. Gates has asked me to write you and say that he accepts your terms for the sale of the meadow and beach property which you hold as trustee, west of Peacock lane and east of the Jacob property, or, in other words, without going into a full description, the premises which you and he have been talking about for the past few months. I understand and Mr. Gates understands that your terms are \$3,000 cash on delivery of deed; said deed to be a usual trustee's deed without warranty. We shall take the deed quite soon, but if you would like to have us sign a regular contract in regular form we shall be glad to do so. Mr. Gates wishes the title to be held temporarily for him by some one in this office, and when the deed is made it may as well be made out to Edward R. Finch, whose residence is New York City. Very truly

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yours, (Signed) J. B. C. Tappan." This letter was, as we have already seen, received by the defendant and taken to his attorneys to be answered, and they answered as follows: "New York, May 4, 1901. J. B. Coles Tappan, Esq., No. 51 Wall St., New York City. Dear Sir—Your letter of the 3d inst., addressed to our client, Mr. William M. Dudgeon, has been handed to us for reply. The salt meadow and beach property at Peacock Point, L. I., referred to in your letter, forms a part of the estate of Richard Dudgeon, deceased, and Mr. William M. Dudgeon, as the executor and trustee of this estate, is desirous of disposing of this property. We have not examined the title to the property in question, but understand that it rests on adverse possession and that there is no documentary title to it. We therefore beg to suggest that you look into the title, and if your client is satisfied to take it, Mr. Dudgeon is ready to give him the usual trustee's deed, without warranty. Kindly let us hear from you as soon as possible, and oblige Very Truly Yours, Hays, Greenbaum & Hershfield." Thereupon the plaintiff's attorney answered under date of May 6, 1901: "Gentlemen—I have your letter of May 4th in reference to the Dudgeon meadow and beach at Peacock's Point, Long Island. Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf. Your suggestion as to my looking into the title is also accepted. Your omission to state the consideration, \$3,000, was, I presume, an inadvertence, and assuming this to be the case, the terms as to consideration also are accepted on behalf of my client. I assume that you will have no objection to Mr. Gates designating some person other than himself to take title in the first instance, as stated in my letter to Mr. Dudgeon. Very truly yours, (Signed) J. B. C. Tappan." No answer was made to this letter until May 13th, 1901, at which time Hays, Greenbaum & Hershfield addressed a letter to Mr. Tappan as follows: "Your letter of the 6th

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instant in reference to the Dudgeon meadow and beach at Peacock's Point received. We shall be pleased to have you confer with our Mr. Hershfield on the subject generally, at your convenience." Thereupon, and under date of May 23d, 1901, Mr. Tappan inclosed a form of deed with the following letter; "H. Hershfield, Esq., 141 Broadway, New York. Dear Sir—I enclose for your examination a draft of the proposed deed from Mr. William M. Dudgeon to Mr. Gates' representative, which I have drawn, as I am familiar with the description and locality of the premises. Very truly yours, (Signed) J. B. C. Tappan." And underneath the signature the following: "I think you may find my draft useful in some way. We can close any time on short notice. J. B. C. T." Here the matter appears to have rested until the third day of June, at which time the plaintiff himself wrote the following letter to the defendant: "Lawyers are, as we well know, proverbially slow, and it does seem quite impossible for me to get any reply to my letter of May 23d, accepting your proposition regarding the sale of the three-acre piece of beach at Glen Cove. I am quite sure if you knew how much this delay hinders me in carrying out some plans, you would see to it that the proper papers were signed at once. I should be pleased to see you, if necessary, and go over the matter, though I suppose everything is practically settled excepting the mere formal part of it. If you think it well to talk it over, I shall be glad to make an appointment with you any day by telephone to this office, where I am most of the day. I trust that the sickness in your family has all departed, and that you and your good wife are quite recovered from the anxiety incident upon such serious illness. With kind regards to Mrs. Dudgeon and yourself, I am Very Sincerely Yours, (Signed) C. O. Gates." To this the defendant answered, under date of June 4, 1901: "Your letter of the 3d inst. is at hand. After a full consideration of the matter, I have come to the con-

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clusion not to sell the property for some time to come. You will appreciate the fact that I am acting in the matter in a representative capacity, having but a fractional interest of my own therein, and that I have not the sole voice therefore.

"I trust you have not been greatly inconvenienced by any delay in obtaining this, my final answer.

"Our little one is well on the road to recovery and Mrs. Dudgeon joins me in thanking you for kind inquiries, and with our best wishes, I am Yours Very Truly, (Signed) Wm. M. Dudgeon. Mr. C. O. Gates, 100 William street, New York."

The trial court has found that these letters constituted a complete and valid contract. The learned Appellate Division appears to have reached a different conclusion. It is undoubtedly true that the courts must take into consideration all of the correspondence upon the subject in determining the question as to whether the minds of the parties had met upon the essential terms of the contract. The first letter of the plaintiff, under date of May 3, 1901, contains a specific offer on the part of the plaintiff to pay \$3,000 cash on the delivery of a deed of the property without warranty. It expresses the wish of the plaintiff to take the title in the name of one Edward R. Finch. The answer of the defendant, through his attorneys, calls attention to the title of the property and then concludes to the effect that if Mr. Gates is satisfied to take such a title "Mr. Dudgeon is ready to give him the usual trustee deed without warranty." This letter was written in answer to that of the plaintiff. No objection is made to the expressed wish of Mr. Gates that the title be taken in the name of Finch. If, therefore, this was an essential feature of the contract, we think that the defendant acquiesced in the request. It is true that the purchase price was not mentioned in this letter. It was, however, stated in the preceding letter, and the answer indicates that if the plaintiff is willing to accept such a title as

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the defendant has to convey, the defendant is willing to give it to him, and we think the letter clearly implies for the consideration named in the previous letter. The question, however, at this point was left open, as to whether the plaintiff was willing to accept the title, and to this he, through his attorney, replies on May 6 that "Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf." Here we have a full acceptance of the terms on behalf of the plaintiff, and it appears to us that it concluded a completed contract in all of its essential details, and from that time became binding upon the parties. We have looked into the correspondence which followed, but find nothing that indicates that the minds of the parties had not met upon the propositions under consideration at the time that the letter of May 6 was sent until the final letter of the defendant under date of June 4, in which he declines to sell or convey the property, and, therefore, are of the opinion that the conclusions reached by the trial court were correct.

The order of the Appellate Division should be reversed, and judgment of the trial court affirmed, with costs to the plaintiff in this court and the Appellate Division.

PARKER, Ch.J.; BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Order reversed, etc.

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**CARL FISCHER-HANSEN, APPELLANT, v. THE
BROOKLYN HEIGHTS RAILROAD COMPANY, RE-
SPONDENT IMPLEADED WITH LOUIS OLSEN.**

COURT OF APPEALS—FEBRUARY, 1903.

§ 66.

Attorney's Lien—Secret Settlement Between Parties.

An agreement between attorney and client by which the former, in consideration of professional services and disbursements in prosecuting an action, is to have one-half of the recovery, followed by notice thereof to the defendant, gives to the attorney a lien upon the claim which cannot be defeated by a secret settlement between the parties before trial. While such lien does not prevent the parties from making an honest settlement between themselves, yet it attaches to the amount they agree upon the instant the agreement is made; and if the defendant pays over the whole amount to the plaintiff, disregarding the lien, he may still be held liable in an action by the attorney to account to him for his share of that amount. (Code of Civ. Pro., sec. 66.)
(Decided February, 1903.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department affirming a final judgment sustaining a demurrer to the complaint.

It is alleged in the complaint, in substance, that on the 5th of January, 1900, the plaintiff, an attorney and counselor at law, was retained by the defendant, Louis Olsen, to commence and prosecute an action against the Brooklyn Heights Railroad Company to recover \$50,000 damages for personal injuries received by said Olsen through the negligence of said company, whereby he lost his right leg. A written agreement was entered into between Olsen and the plaintiff

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whereby the former agreed that the latter, in consideration of his professional services to be rendered and the disbursements to be made in the said action, should have 50 per cent. of the verdict recovered therein. The action was commenced and prompt notice in writing was given to the defendant that the plaintiff claimed a lien upon the papers and subject-matter of the action for his services therein, and requesting it to make no settlement with said Olsen or with any person other than himself. After the defendant had served its answer and the case, duly noticed for trial by both parties, had been placed upon the calendar for trial, the defendant, without notice to the plaintiff herein, settled with the plaintiff therein and agreed to pay him the sum of \$1,500. Upon receiving from him a written release of all claims by reason of said cause of action, it paid him that amount, but no provision was made for the satisfaction of the plaintiff's lien. The settlement was made in secret, and on the next day, Olsen, who was financially irresponsible, returned to Norway, his native country, where he has since remained. The plaintiff alleged that, by virtue of these facts, he was justly entitled to the sum of \$750, one-half of the amount paid in settlement as aforesaid, but that no part thereof had been paid by either of the defendants, although payment had been duly demanded. His demand for judgment was that his lien in said action as attorney for said Olsen "be ascertained and foreclosed against said defendants and each of them; that this court settle and determine the equities of the parties hereto in relation to plaintiff's said lien in the action hereinbefore referred to"; that by reason of the premises the defendants, or either of them, be adjudged to pay him the amount claimed "based upon" said settlement, and for such other relief "in the premises as shall be just and equitable."

The defendant railroad company demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sus-

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tained both by the Special Term and the Appellate Division, and after the entry of final judgment the plaintiff appealed therefrom to this court.

John R. Dos Passos and Carl Fischer-Hansen, for appellant.
John L. Wells, for respondent.

VANN, J.—The law has made great progress in protecting members of the bar since Blackstone wrote that “a counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation” (Chase’s Blackstone, 3d ed., 630). It seems strange to the lawyer of this generation to read the report of a case decided as recently as 1841, in which those eminent lawyers, Samuel Stevens and Peter Cagger, as co-partners, had sued their client to recover the sum of \$300 for arguing two cases in the Court of Errors (*Stevens v. Adams*, 23 Wend. 57; aff’d, sub. nom. *Adams v. Stevens*, 26 Wend. 451). It was gravely argued for the defendant “that at common law a counselor cannot maintain an action for his fees”; that “such is undeniably the law of England, and in this State it has not been held otherwise, the question never having been directly brought up for adjudication.” It was held, however, without a dissenting vote either in the Supreme Court or the Court of Errors, that the action would lie, although there was no reported precedent in this State to justify it. Chancellor Wolcott, writing for the Court of Errors, declared that he had no doubt “that by the law of this State, as it has always existed from the time of its first settlement, the lawyer, as well as the physician, was entitled to recover a compensation for his services; and that such services were never considered here as gratuitous and honorary merely.” Judge Cowen for the Supreme Court said that, as he understood, “there has been a case, perhaps several cases, in this

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court wherein counsel have been allowed to recover of their clients argument fees in a *quantum meruit*."

Thus, within the memory of lawyers now living, the right of counsel to recover compensation from their clients, outside of the fee bill, was challenged at the bar and elaborately discussed by the bench, three opinions having been written in the court of last resort to show that the right existed. There has been a marked advance since then, mainly through the Legislature, which has been generous to members of the legal profession, not only in costs and allowances, but also in providing a lien upon the subject of the action to secure their compensation.

When the Code of Procedure was enacted in 1848 the fee bill was abolished, all restrictions upon "the right of a party to agree with an attorney, solicitor or counsel, for his compensation" were repealed, and the measure of such compensation was thereafter "left to the agreement, express or implied, of the parties" (L. 1848, ch. 379, sec. 258).

In 1876, when the first part of the Code of Civil Procedure was passed, the only regulation upon the subject was the following: "The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not maintained by law" (L. 1876, ch. 448, sec. 66).

While this statute was in force a case arose wherein the plaintiff sued a railroad company for damages owing to personal injuries caused by its negligence. He made a written agreement with his attorney to give him one-half of the recovery for prosecuting the action and paying the expenses. After the commencement of the action the defendant, with notice of the facts, settled with the plaintiff by paying him \$1,000, and it was held by this court that, as the cause of action was not in its nature assignable, the party could not, by any agreement before verdict or judgment, give his attorney an interest therein, and that the settlement was a bar to the action, notwithstanding the agreement that the

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attorney was to receive a share of the recovery (*Coughlin v. N. Y. C. & H. R. RR.*, 71 N. Y. 443).

After this decision, and doubtless owing to it, said section was amended by adding at the end thereof the following: "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment" (L. 1879, chap. 542, p. 617, sec. 66).

In 1899 the section was further amended by making it apply to a special proceeding, extending the lien to a claim as well as a cause of action and a counterclaim, and providing a remedy to determine and enforce the lien upon the petition of either attorney or client, so that the section in its present form, and as it stood when this controversy arose, is as follows: "The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien" (L. 1899, chap. 61, p. 80, sec. 1; Code Civ. Proc., sec. 66).

Thus we have a statute gradually progressing in one direction, which has required more than half a century for its development. It consists of only three sentences, but each has been the subject of one or more independent en-

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actments intended to protect attorneys and enable them to collect pay for their services. The first establishes freedom of contract between attorney and client with reference to the compensation of the former. The second and most important gives the attorney a lien upon his client's claim and cause of action, and when the cause of action is merged in a verdict, report, decision or judgment, the lien attaches to that also as well as to the proceeds thereof, so that it cannot be affected by a settlement made between the parties at any stage of the action. The third provides a new remedy.

This act was construed by us in a recent case where the cause of action had become merged in a judgment, and we held that the statute created "a lien in favor of the attorney on his client's cause of action, in whatever form it may assume in the course of the litigation, and enables him to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment"; that all the world must take notice of the lien, and that it was unnecessary for the attorney to give notice of his claim to the other party (*Peri v. N. Y. C. & H. R. RR.*, 152 N. Y. 521).

In discussing the subject we said: "It is urged by the defendant's counsel that this construction of the section is against public policy, as the law favors settlements; that the plaintiff's attorney might refuse to disclose his lien, and thereby stand in the way of settlement and compel the parties to litigate who desired to compromise their differences. This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement. The client is still competent to decide whether he will continue the litigation or agree with his adversary in the way."

There is much learning in the books relating to the lien of an attorney upon a judgment for his costs as it existed before the statute, and though now virtually obsolete, it shows the fixed determination of the courts to protect

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attorneys against fraudulent settlements. The lien upon a judgment was not created by statute, but was "a device invented by the courts for the protection of attorneys against the knavery of their clients by disabling their clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained (*Goodrich v. McDonald*, 112 N. Y. 157, 163).

We now have under consideration a case where a settlement was made before judgment or even a trial, and the defendant claims that the lien of the plaintiff did not attach to the sum which it agreed to pay for a release of the cause of action. Its counsel concedes that the plaintiff might have interposed and prosecuted the action to judgment in his own behalf, notwithstanding the settlement. This form of relief is clumsy and illogical, because it authorizes the trial of a dead lawsuit in the interest of one who never owned the claim upon which it was founded. It was a device of the courts, not of the Legislature, and sprang from the necessity of providing some remedy against fraudulent settlements. While it may still be resorted to in such cases, it would be of no value to the plaintiff, because his client immediately after the settlement went beyond the jurisdiction of the courts of this country and has remained absent ever since. Moreover, by bringing this action the plaintiff ratified the settlement and can have no relief except under the statute, which it is now our duty to construe.

The statute is remedial in character, and hence should be construed liberally in aid of the object sought by the Legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action. The common law gave them no lien until the entry of judgment, but the statute gives them one from the commencement of the action. If the claim is prosecuted to judgment, or to a decision upon which judgment may be entered, the lien reaches forward and attaches to that also. When the claim is thus extinguished by merger in a higher security, the

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statute makes express provision for the transfer and continuance of the lien. When, however, the claim is extinguished by a settlement, the statute does not expressly provide that the lien shall extend to the proceeds, and the precise question before us is whether, in view of the history and object of the act, this is impliedly commanded. Upon common-law principles the lien on the cause of action follows the proceeds into the hands of the client after payment to him, but as in this case he is irresponsible, it is necessary to determine whether the lien settled upon the fund before the defendant paid it over. Where was the lien during the interval, whether long or short, between the time of coming to terms and the time of payment? The statute says that the lien cannot be affected by any settlement between the parties before or after judgment, but does it mean that no settlement whatever can be made without the consent of the attorney? It clearly means this, unless a lien is impliedly transferred to the proceeds of the settlement. But did the Legislature, in its effort to protect attorneys, intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action? Did it intend to overturn the ancient and honored rule of law that settlements are to be encouraged, by giving the attorney power to insist that the litigation must continue until he consents that it should stop? Did it intend to so tie the hands of the client that he could not settle his own controversy without the permission of his attorney? A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental and for the purpose of security only, it would not be reasonable to hold that the Legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney, and we so held in the *Peri* case, where we

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declared that "the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement." The right of the parties to thus settle is absolute and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and, if they have been paid over to the client, to insist that his share be ascertained and paid to him, for the defendant is estopped from saying that with notice of the lien he parted with the entire fund.

Of course we do not refer to dishonest settlements made to cheat attorneys, which the courts will brush aside with a strong hand, but to honest settlements, made in good faith, because the client preferred something certain in hand to the uncertainty of protracted litigation. Such settlements are not prohibited by the existence of the attorney's lien. The Legislature did not intend to make the lien the chief thing, nor to compel the client to abdicate his position as principal in favor of the agent or attorney whom he employed in order to secure his rights. It did not intend to prevent him from dealing with his own property as he saw fit, provided he exercised his honest judgment and took no advantage of his attorney. In this case the plaintiff, by standing on the settlement, admits that it was made in good faith, and thus confirms his lien upon the proceeds, which was not defeated by payment to his client, for the defendant paid at its peril. It had both actual and constructive notice of the lien, and while it does not appear that it knew the share of the fund that the plaintiff was entitled to receive, its duty was to ascertain the amount and retain it for him.

Moreover, the general rule is that a lien upon the property attaches to whatever the property is converted into, and is not destroyed by changing the nature of the subject. Thus a lien upon timber ordinarily extends to the shingles made out of it; a lien upon domestic animals to their young subsequently born, and a lien upon a mortgage to the land into

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which the mortgage is converted by foreclosure. It follows its subject and cannot be shaken off by a change of form or substance. It clings to any property or money into which the subject can be traced, until it reaches the hands of a bona fide purchaser. So a lien upon a claim or a cause of action follows the fund created by a settlement of the claim, which thereupon ceases to exist. It attaches to the amount agreed upon in settlement the instant that the agreement is made, and if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter and must stand the consequences. We think that the plaintiff had a lien upon the sum which the defendant agreed to pay to extinguish the cause of action, and that the law will not permit it to say that it has nothing in its hands to satisfy it. The lien was not affected by the adjustment, but leaped from the extinguished cause of action to the amount agreed upon in settlement.

The remedy provided by the Code by means of a petition is not exclusive, but cumulative, for a court of equity has always had power to ascertain and enforce liens. We have endeavored to establish that the plaintiff's lien was transferred from the cause of action to the fund into which the claim was converted by the action of the parties, and hence within familiar principles a court of equity has power to enforce that lien in an action brought for that purpose. Actions to establish and enforce liens are among those most familiar to equity jurisprudence. Even if the relief ultimately granted is in the form of a money judgment, still that will be possible only through the exercise of equitable jurisdiction in ascertaining the lien and determining its amount. A money judgment may then follow, as a foreclosure is unnecessary when the subject of the lien has already been converted into money (*Baily v. Hornthal*, 154 N. Y. 648, 661; *Mooney v. Byrne*, 163 N. Y. 87, 96). While the statute gives the lien, the plaintiff must show that he comes within the statute by establishing the facts

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alleged in his complaint, and the action is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff or was waived or forfeited by his misconduct or neglect.

The judgment should be reversed, the demurrer overruled and judgment rendered for the plaintiff, with costs in all courts.

PARKER, Ch.J.; GRAY, BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur.

Judgment reversed, &c.

IN THE MATTER OF THE JUDICIAL SETTLEMENT
OF THE ACCOUNT OF MARY E. FITZSIMONS, AS
ADMINISTRATRIX DE BONIS NON OF ANN CAS-
SIDY, DECEASED; IN THE MATTER OF THE APPLI-
CATION OF I. NEWTON WILLIAMS TO ENFORCE
AN ATTORNEY'S LIEN; I. NEWTON WILLIAMS,
APPELLANT, v. MARY E. FITZSIMONS, ADMINIS-
TRATRIX, RESPONDENT.

COURT OF APPEALS—FEBRUARY, 1903.

§§ 66, 73, 74.

*Attorney's Lien—Agreement for Fifty per Cent. of Recovery—
Secret Settlement Between Parties.*

An agreement between an attorney and his client whereby the former is retained to discover and secure all the property to which the latter is entitled as an heir at law and next of kin of a decedent, and whereby the client assigns and sets over to his attorney one-half of all the property which may be recovered in full of

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his compensation, out of which one-half when recovered the attorney agrees to compensate the attorney for whom he is substituted, for past services and for services to be rendered thereafter, as an associate, is not champertous; and is not obnoxious to sections 73 and 74 of the Code.

Under section 74 of the Code, an attorney may agree upon his compensation; his agreement may be contingent upon success and payable out of the proceeds of the litigation and he may agree that his compensation shall cover his own services and those of another attorney associated with him.

When a client settles with his adversary without notice to his attorney and in fraud of his rights, of which the adversary has notice, and the attorney endeavors, under section 66 of the Code, to protect his lien in the proceedings in which the settlement was made, and asserts such an agreement and alleges that he has a status to continue the proceeding in the enforcement of his lien, the agreement cannot be held illegal as being unconscionable until the question has been fully and fairly investigated and the facts established by a trial.

Until such trial shall have been had, it is not competent for an appellate court on affidavits alone to hold as a matter of law that an agreement for one-half the recovered amount is unconscionable.

Upon the trial of the issues presented to the court in which the proceeding has been pending, that court presumably will make such disposition of the matter as justice requires and may establish the attorney's lien to such an extent only as shall be legal in view of the agreement between the parties.

Where an accounting executrix settles with an objectant with notice of the attorney's lien and in fraud of his rights under an agreement, and seeks, upon filing a withdrawal of the objections and a release of the objectant's rights, to dismiss the attorney from the case and to have the account judicially settled, whereupon the attorney presents a petition setting forth facts entitling him to a part of any recovery to which his client would be entitled upon the accounting and praying for the determination and enforcement of his lien, and such accountant's motion is denied by the Surrogate, the order of the Appellate Division reversing the Surrogate and dismissing the petition of the attorney for the enforcement of his lien and imposing personal costs upon the attorney, is a final order and reviewable in the Court of Appeals.

(Decided February, 1903.)

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Appeal from an order of the Appellate Division in the First Department, reversing an order of the New York County Surrogate's Court, and dismissing the appellant's proceeding to establish and enforce an attorney's lien and denying him the relief prayed for in his petition therein.

Henry W. Jessup, for appellant.

Charles E. Miller, for respondent.

MARTIN, J.—On August 27, 1897, Ann Cassidy died in the City of New York, leaving her surviving, as her only heirs at law and next of kin, a daughter, Mary E. Fitzsimons; a son, Peter A. Cassidy, and a grandson, John P. McNally. About ten days before her death she delivered to Father Colton, rector of St. Stephen's Roman Catholic Church, eighteen or twenty bank books belonging to her, and requested him to collect the sums due thereon, amounting to \$71,481.93, declaring that she would subsequently inform him what disposition to make of the money, when so collected. He collected that amount, but the intestate never gave him any instructions or information as to the disposition she desired made of the amount thus received by him. Subsequently to her death he delivered to Mary E. Fitzsimons \$12,931.63 and an equal amount to Peter A. Cassidy. He also delivered to the latter, who had been appointed administrator of the estate of Ann Cassidy, deceased, as such administrator, the further sum of \$43,618.66 to protect the rights of John P. McNally as one of the next of kin and heirs at law of the deceased. This sum Peter A. Cassidy deposited for the estate with the New York Life Insurance and Trust Company in his name, as such administrator. He afterwards died, and Mary E. Fitzsimons was appointed as administratrix *de bonis non*. Soon after her appointment she withdrew from the insurance and trust company the amount so deposited by Peter, and secretly, and without any notice to John P. McNally, his father, or his committee,

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divided it between herself and Mary L. Cassidy, the widow of Peter A. Cassidy, to the exclusion of John P. McNally and the parties representing him or his interest therein. At the time of the death of Ann Cassidy, John P. McNally was, and had been for years, insane and confined in an asylum in the State of New Jersey, of whom William Harrigan had been duly appointed a committee both of his person and estate by the Supreme Court of the State of New York. The appellant's first retainer was by such committee, by whom he was employed as attorney to discover and obtain the property belonging to such estate in which his ward had an interest, which arrangement or retainer was made with the consent and approval of Michael McNally, the father of such incompetent. After the death of John P. McNally, leaving his father his only next of kin and heir at law, the latter, under and by a written agreement, retained the appellant as his attorney to discover and secure all the property to which he was entitled as heir at law and next of kin of his deceased son in the estate of Ann Cassidy, and agreed to pay him, in full compensation for his services, one-half of the property that should be recovered. He also thereby assigned and set over to the appellant one-half of all the property which he thus inherited. The appellant accepted the employment and agreed to perform the necessary services, and likewise to pay out of the compensation he should thus receive the claim of Robert S. Pelletreau for his services therein, who was also then employed to act, and acted as one of the attorneys in the case in conjunction with the appellant. Of this agreement, notice was given to all the parties interested in the estate.

In 1901 proceedings were instituted by the appellant as such attorney in the Surrogate's Court of the County of New York to compel Mary E. Fitzsimons, as administratrix of the estate of Ann Cassidy, deceased, to account as such for the estate of her intestate. She thereupon filed an account in the form of an affidavit, in which she averred that

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she never received any property of any kind or description belonging to the estate of the decedent. The appellant, as attorney for McNally and Harrigan, administrators of the estate of John P. McNally, deceased, then filed objections to the account, charging the administratrix with having received upwards of \$40,000 in cash and of being legally responsible to account for \$85,000 in addition thereto. After these objections were filed, the matter was, by the Surrogate's Court, referred to Charles H. Beckett, Esq., to take proof thereon. Thereafter such reference proceeded to a hearing, and continued from time to time from the 6th of December, 1901, to the 8th of May, 1902. On the 1st of April, 1902, counsel for the administratrix offered in evidence before the referee a consent purporting to have been signed on March 21 by Michael McNally, one of the contestants of the account, withdrawing the objections and consenting that the account be judicially settled and allowed as filed. It is obvious from the record that this consent was procured secretly and by collusion between the respondent and said McNally, who was insolvent and irresponsible. A motion was then made by the administratrix that the referee report to the court approving such account. This motion was opposed by the appellant upon the ground that he had a lien upon and an assignment of a part of the claim of McNally for his fees and compensation as such attorney, which should be first adjusted. The motion was denied. Subsequently a release by McNally was produced; the motion was renewed and was opposed upon the same ground. The matter was then brought before the Surrogate's Court, where the same motion was made, and thereupon the appellant filed a petition setting forth the facts of his retainer as attorney; that he had a lien upon the claim of McNally for his fees and services performed under such retainer; had a written agreement therefor and an assignment of one-half of such claim; that the settlement was secret and collusive, and that his client was insolvent, and prayed that the motion

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might be denied and the reference continued to the end that his rights as such attorney under his agreement and under the provisions of the Code might be determined and enforced according to law. The record tends to show that after they had full notice of the appellant's claim and assignment, Mary E. Fitzsimons and Mary L. Cassidy, by whom the property of the estate had been wrongfully appropriated, agreed with Michael McNally to pay the appellant and his associate their fees and compensation, and gave a bond in the penal sum of \$20,000 to indemnify him against all their charges. Upon the presentation of the appellant's petition and the affidavits and other papers accompanying it, the motion of the administratrix was denied. She then appealed to the Appellate Division, which reversed the order denying her motion and dismissed and denied the petition of the appellant to have his lien as such attorney determined and enforced. It further ordered that the objections to the administratrix's account be withdrawn, the referee directed to report to the Surrogate's Court approving her account as filed, and that the appellant pay to her \$10 costs on the dismissal of his petition and \$10 costs on the motion to withdraw. From that determination the appellant has appealed to this court.

The first question presented is whether the order appealed from was a final order in a special proceeding and reviewable by this court. A proceeding before the surrogate for a compulsory accounting by the administratrix was pending. The latter applied to have the objections to her account withdrawn, and the proceedings terminated in her favor upon the consent of one of the original contestants. Upon the presentation of that motion to the Surrogate's Court the appellant presented a petition setting forth facts entitling him to a part of any recovery to which his clients would be entitled upon such accounting and to compensation as attorney for the contestants. He also asked that his rights as such attorney under the agreement between himself

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and the contestants be determined in that proceeding and the proceeding continued for that purpose. That he had a right to present such a petition to the Surrogate's Court and that it was the duty of the court to continue the proceeding for the purpose of enabling him to establish his right to the compensation claimed, especially as his client was insolvent and the alleged settlement was secret and collusive, is abundantly established by the plain provisions of the statute and the decisions of this court (Code Civ. Pro., sec. 66; *Peri v. New York Central RR.*, 152 N. Y. 521; *Matter of Regan*, 167 N. Y. 338; *Matter of King*, 168 N. Y. 53; *Fischer-Hansen v. B'klyn Heights RR.*, 33 Civ. Pro. Rpts.) That the proceeding instituted by the appellant to establish his lien was a special proceeding which might be properly instituted in a Surrogate's Court there is now no doubt. Obviously the Surrogate's Court entertained that view and continued the proceeding for that purpose. But the Appellate Division dismissed the appellant's petition and denied his right to establish such lien before any evidence as to the facts had been given and with no proof before it except that set forth in the affidavits used upon the motion. The order of the Appellate Division dismissing the appellant's petition and denying his right to establish such lien was a final order in a special proceeding, and, therefore, appealable to this court.

This brings us to the consideration of the question whether the learned Appellate Division was justified in denying the appellant the relief sought and in dismissing his proceeding. The grounds upon which this determination was based were twofold: First, that the agreement entered into between the appellant and his client was champertous; and, second, that it was unconscionable.

First, then, was it champertous. Section 74 of the Code of Civil Procedure provides that "An attorney or counselor shall not, by himself or by or in the name of another person, either before or after action brought, promise to give or procure to be promised or given, a valuable consideration

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to any person as an inducement to placing, or in consideration of having placed, in his hands or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received." The common-law doctrine relating to champerty and maintenance no longer exists in this State (*Sedgwick v. Stanton*, 14 N. Y. 289). The subject is now regulated by sections 73 and 74 of the Code of Civil Procedure (*Irwin v. Curie*, 171 N. Y. 409, 411). The first of these sections prohibits an attorney or counselor from buying a claim with the intent and for the purpose of bringing an action thereon, and has no application here. Under section 74 an attorney may agree upon his compensation, his agreement may be contingent upon his success and payable out of the proceeds of the litigation, and such contracts are not illegal, but are continually enforced. With the question whether the statute permitting such contracts is wise or otherwise we have nothing whatever to do. Such is the law, and if the agreement made by the appellant is within its protection, it is valid, and it is the duty of the courts to enforce it. The learned Appellate Division were of the opinion that this contract fell within the condemnation of section 74 for the sole reason that the appellant agreed to pay out of such compensation as he should receive any claims that his associate attorney might have for services performed, or to be performed, by him in such litigation. It is to be observed that there was nothing in this agreement by which the appellant became personally responsible to pay his associate. The effect of the agreement was that the appellant was to have one-half of the recovery, and out of it and not otherwise was to compensate his associate. In other words, the real arrangement between the parties was that one-half of the recovery should be paid and received in full compensation for the services of the appellant and his associate.

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To say that by this provision the appellant had promised to give, or that there should be given, to his clients a valuable consideration as an inducement to placing the account in his hands is not a fair construction of the agreement. Here was a fund being wrongfully secreted and retained by and with the consent of an administratrix which in part belonged to the client of the appellant and his associate. The three being present, an agreement was entered into by which the attorneys were to have one-half of any property that could be found and recovered, to be delivered to Williams, and out of the property thus received by him he was to compensate his associate for his services. We think this agreement does not fall within the prohibition of section 74. As was, in effect, said by Finch, J., in *Fowler v. Callan* (102 N. Y. 395, 398), the appellant neither sought the retainer nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unprejudiced choice of the client. The agreement appears to have been purely one for compensation. The arrangement contemplated success, in which event one-half of the recovery would pay both attorneys. The compensation for the services of both would be discharged out of the portion of the property which would come into the hands of the attorney for that precise purpose. The contract in no respect induced or protracted the litigation. The appellant stirred up no strife, induced no litigation, but merely agreed to take for the compensation of himself and his associate, who was present at the time of the agreement and presumptively consented to it, one-half of the recovery to be divided between them as they should agree. The contention that this agreement was within the prohibition of section 74, and, therefore, void, cannot, we think, be upheld (*Benedict v. Stuart*, 23 Barb. 420; *Peri v. New York Central R.R.*, 152 N. Y. 521). This case is clearly distinguishable from *Stedwell v. Hartmann* (74 App. Div. 126), as in that case the attorney was to pay all expenses; or, in other words,

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to himself maintain the suit, and it was held that such an agreement was champertous. Not so here. Here the appellant agreed merely for a compensation for the services of himself and his associate, payable out of the recovery.

The only remaining question is whether the agreement between the appellant and his associate and their client that the former should receive one-half of the recovery is unconscionable, and for that reason the appellant's proceeding should have been dismissed and his right to establish and enforce a lien for their compensation denied. In the first place, it is difficult to see how the court below could have properly reached the conclusion that the agreement was unconscionable, without proof as to the amount the appellant would have received if such lien had been established and enforced, or if the entire services performed by the appellant and his associate, or of the actual expenses to which they were subjected, and the other facts relating to the subject.

In view of the fact that by express statute the right is conferred upon an attorney or counselor to regulate the amount of his compensation by agreement with his client, which is unrestrained and unlimited by law, we cannot see how such an agreement can be interfered with and held illegal until the question has been fully and fairly investigated and the facts relating to the transaction plainly established by a trial. The statute conferred upon the parties the right to make the contract, and conferred upon the court no authority to make it for him. If, however, upon a proper examination of the appellant's claim it should be found that the agreement between himself and his client was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain improper or undue advantage, the court might correct any such abuse. Admitting that, it furnished no justification for the court's dismissal of the appellant's proceeding to establish an attorney's lien where there was no proof as to the amount of labor performed, or the amount which would in fact be

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received by the attorney under the agreement made between them. As was said by Bartlett, J., in the *Peri* case: "The settlement of a litigation ought, in fairness, to be made with full knowledge of plaintiff's attorney and under conditions protecting his lawful lien. If he seeks to take an unfair advantage of a desire to settle, he is, as an officer of the court, under his constant scrutiny and control, and will be confined in his lien to his taxable costs and such additional amount as he may be able to duly establish by agreement, express or implied."

In this case the amount of the estate was never clearly established. Nor were the character and extent of the services performed definitely proved. Indeed, there was no issue between the parties as to the fairness or propriety of the contract, but the only ground upon which the respondent sought an affirmance of her account upon the consent of one of the contestants was that the attorney had no right to proceed in the Surrogate's Court for the purpose of establishing their lien. In other words, the only question raised in the Surrogate's Court was as to the jurisdiction to continue the proceedings for the purpose of establishing and enforcing the attorney's lien. The Surrogate's Court held that it had such jurisdiction and denied the motion to affirm the administratrix's account, thus in effect holding that the appellant had a right to contest the accounts of the administratrix and the release which was subsequently executed by the contestant to protect his right as assignee, as well as attorney therein. But when the case reached the Appellate Division the question upon which the motion was decided by the court below was ignored, and that court held, as a matter of law, that the agreement was unconscionable. Under the circumstances it seems impossible that the learned Appellate Division had any jurisdiction to review that question when there was no issue raising it or trial presenting the facts relating thereto. Surely the appellant could not properly be thrown out of court and have his petition dis-

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missed and all relief denied without an opportunity to be heard upon the question. If, after trial, when the question has been properly presented by proof, it shall be shown that the amount claimed was unconscionable, it is fair to presume that the trial court will make such disposition of the matter and establish the appellant's lien to such an extent only as shall be legal in view of the agreement between the parties. When that question has been passed upon by the trial court it may be properly presented to the learned Appellate Division for review. But until it is so presented, that court has no right to determine the question. "It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court to determine controverted questions of fact and render final judgment upon such determination" (Benedict v. Arnoux, 154 N. Y. 715, 724). This principle applies to an appeal from a final order in a special proceeding, as well as from a judgment (Code of Civ. Pro., sec. 1361), and the procedure and rights of the parties upon an appeal from such an order are to be considered in the same manner, subject to the same powers and limitations as action where the same issues are involved (People *ex rel.* Man. R'y v. Barker, 152 N. Y. 417; Matter of Chapman, 162 N. Y. 456, 460).

Thus we are led to the conclusion that the learned Appellate Division erred in dismissing the plaintiff's petition and denying him the relief sought, when there had been no investigation or trial as to the facts, and that the order of the Appellate Division should be wholly reversed, and the proceeding remitted to the Surrogate's Court for further action thereon.

Order of Appellate Division reversed and the order of the Surrogate's Court affirmed, with costs to abide the final award of costs in the proceeding.

PARKER, C.J.; and GRAY, O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur.

Yorkville Bank v. The Zeltner Brewing Co.

YORKVILLE BANK, RESPONDENT, v. THE HENRY ZELTNER BREWING COMPANY, DEFENDANT.
WILLIAM B. SUTHERLAND, AS TEMPORARY RECEIVER OF THE PROPERTY OF THE HENRY ZELTNER BREWING COMPANY, APPELLANT.

SUPREME COURT—APPELLATE DIVISION. FIRST DEPARTMENT—MARCH, 1903.

§§ 431, 1810, SUBD. 3.

Resignation of Officer of Corporation—Service of Process Upon Officer After Resignation—Appointment and Authority of Receiver.

The resignation of an officer of a private corporation becomes valid and effectual without acceptance. Service of process upon such an officer, after his resignation, does not bind the corporation. The Supreme Court has jurisdiction to appoint a receiver of the property of an insolvent domestic corporation, at the suit of a stockholder thereof, to care for and preserve its assets, on the ground that its directors, president and treasurer had resigned, and the corporation had no officer empowered to hold its assets. The modification of an order appointing such a receiver, by relieving a particular creditor from the operation of an injunction contained therein, does not invalidate the receivership, and the receiver is authorized to move to vacate a judgment entered against the corporation.

(See *Zeltner v. The Henry Zeltner Brewing Co.*, 33 N. Y. Civ. Pro. 298.)

(*Decided March, 1903.*)

Appeal from order denying motion by the receiver to vacate judgment.

Henry A. Forster, for appellant.

Moses Weinman, for respondent.

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INGRAHAM, J.—The plaintiff commenced this action to recover the amount due on a promissory note made by the defendant corporation and indorsed by the other defendants. The summons and complaint was alleged to have been served upon the defendant by delivering copies thereof and leaving the same with William H. Zeltner, as president of the corporation, on the 4th day of February, 1902. On February 1, 1902, three days before this alleged service, William H. Zeltner executed the following instrument:

"I hereby resign my office as president of The Henry Zeltner Brewing Company, my resignation to take effect this first day of February, 1902.

"WILLIAM H. ZELTNER."

At the same time he also resigned as a director of the corporation.

On February 5, 1902, an action was commenced by William H. Zeltner individually and as executor of the last will and testament of Henry Zeltner, deceased, against The Henry Zeltner Brewing Company. It was alleged in the complaint that the plaintiff was a stockholder of the defendant corporation; that the corporation was insolvent and unable to pay its existing debts and obligations; that the directors and the president and treasurer of said defendant had resigned their offices severally, individually and respectively, which resignations had already taken effect, so that the positions of said officers and the directorships in said corporation were in fact each and all vacant and unoccupied, and that no other officer or director or board of directors remained or existed authorized or empowered to hold any of the assets and property of said defendant; and asking for the appointment of a receiver to preserve the property of the corporation; and an order to show cause was granted requiring the defendant and the attorney-general to show cause at Special Term of the Supreme Court in the County of Westchester, on the 7th day of February, 1902, why a receiver of the property of the corporation should not be appointed under section 1810 of the

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Code of Civil Procedure. This motion coming on to be heard, no one appearing on behalf of the attorney-general, and counsel for the defendant corporation not opposing, William B. Sutherland was appointed receiver "of the property, both real and personal, stock, franchises, contracts, things in action, assets and effects of every kind and nature of the said defendant corporation." This order was entered on the 7th day of February, 1903, and contained an injunction restraining the creditors of the corporation from beginning any action or proceeding against the said corporation for the recovery of a sum of money or from taking any further proceedings in any such action or proceeding theretofore commenced.

Subsequently the plaintiff in this action, as a creditor of the defendant corporation, applied to the Supreme Court to vacate and set aside the order appointing the receiver and for leave to enter judgment in its action against the defendants and to issue execution against the property of the defendants. That motion was denied by the Special Term, whereupon the plaintiff in this action appealed to the Appellate Division in the Second Department, where the order denying this motion was reversed, and the order appointing the receiver modified so as to relieve the Yorkville Bank from the operation of the injunction contained therein, and to permit said bank to prosecute its claims and to enforce any judgment obtained against the property in the hands of the receiver. Mr. Justice Bartlett, in delivering the opinion of the Appellate Division, recognized the general proposition that the acceptance of a resignation is ordinarily not essential to its effectiveness, citing *Noble v. Euler* (20 App. Div. 549), which sustains that proposition; holding, however, that the resignation of the officers of the defendant corporation did not free them from the obligation which previously rested upon them in regard to the custody of that property until other officers should be duly appointed to care therefor; that they still remained officers empowered to hold the same within the meaning of subdivision 3 of section 1810 of the Code of Civil Pro-

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cedure. The court did not intimate that the order appointing the receiver was void, but that under such circumstances the order, so far as it enjoined the plaintiff in this action from proceeding in its action against the corporation, should be modified, and the plaintiff allowed to proceed in his action against the corporation. The order appointing the receiver was not void. The Supreme Court had jurisdiction to pass upon the question as to whether or not there were officers empowered to hold the assets of the corporation, and having passed upon that question and determined that a receiver should be appointed, its determination was valid until reversed, and the receiver was vested with the title to the assets of the corporation until his appointment was revoked by the court. The Appellate Division in its order did not vacate the order appointing the receiver. Upon the plaintiff's motion as a creditor, it modified the order so far as to relieve the plaintiff from the effect of the restraining order therein contained, leaving the order appointing the receiver in other respects unaffected. The order of the Appellate Division was entered without notice to the attorney-general, and, so far as appears, he had no notice of the application to vacate or modify the order of February 7 appointing the receiver. The plaintiff thus being relieved from the injunction, entered judgment against the defendant corporation on the default of an answer or appearance by the defendant. Whereupon the receiver moved to vacate that judgment upon the ground that there was no service of the process upon the defendant corporation. Section 431 of the Code of Civil Procedure provides that "personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof within the State * * * to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent." It would seem to be quite clear that there was no service of the summons and complaint upon the corporation within the provision of this section. The person who was

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served had been the president and a director of the corporation, but before the service of the summons upon him had resigned as president and director thereof. At the time of the service of the summons and complaint he occupied no official position in the corporation, and the service of the summons and complaint upon him conferred no jurisdiction upon the court to proceed against the corporation. Applying the rule stated by the Appellate Division in the Second Department upon the appeal from the order denying the motion to vacate the order appointing the receiver, that the resignation of the officers of the corporation did not free them from the obligation which previously rested upon them in regard to the custody of the property until other officers should be duly appointed to care therefor, the officers who had resigned were not the officers upon whom the summons and complaint could be served under section 431 of the Code which would entitle the plaintiff to enter judgment against the corporation. In *Noble v. Euler* (20 App. Div. 548) it was said: "Although this resignation was not formally accepted until February, 1892, the referee correctly held that it became effective when tendered in the previous November"; and it was held that a report of that corporation, which the law required to be verified by the president, secretary and treasurer of the corporation, was sufficient when verified by the president, as by the resignation of the secretary and treasurer those offices became vacant. If, after such resignation, a summons had been served upon the secretary and treasurer who had resigned, it would seem to be clear that that service would not be a service of process upon the corporation. So in this case the service of process upon the person who had been president and a director of the corporation, but who had resigned, was not sufficient to justify the entry of judgment against the corporation.

The only remaining question is whether this receiver could move to vacate the judgment. By the order appointing him receiver he was vested with the assets of the corporation. It

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was thus his duty to protect such assets and hold the same subject to the order of the court. Under this order he was authorized to move to vacate a judgment which, upon its face, gave the plaintiff a right to issue an execution against the property of the corporation in his hands when such a judgment had been entered without authority and was void. I think, therefore, the motion should have been granted.

The further question whether this order of the Appellate Division in the Second Department could affect this receiver as it was made without notice to the attorney-general, and no copy of either the motion papers upon the motion to vacate the order appointing the receiver or of the proposed order of the Appellate Division entered upon that motion was served upon him, is presented. The order appointing the receiver having been made upon notice to the attorney-general, he was clearly entitled to notice of all applications to modify or vacate that order. But as we think that the judgment entered against the defendant was improperly entered because the court obtained no jurisdiction over the defendant, and that the receiver of the corporation had a right to move to vacate that judgment, it is not necessary to pass upon the effect of the failure to give notice to the attorney-general.

The order appealed from should be reversed with \$10 costs and disbursements, and the motion to vacate the judgment granted, with \$10 costs.

All concur.

NOTE.—CORPORATION—RECEIVER—WHO MAY APPLY—SEE SAME CASE IN COURT OF APPEALS, SUPRA.

A stockholder and an officer, who is also a non-resident, may apply to the court for the appointment of a receiver where an action has been brought for the dissolution of the corporation, being a foreign corporation, in the state of its domicile.

Subdivision 3 of section 1810 Code of Civil Procedure authorizes such an application to preserve the assets where there are no officers empowered to hold the same. *McNabb v. Porter Air Lighter Co.*, 44 App. Div. 102-104.

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A party in interest may apply. *U. S. Trust Co. v. N. Y., W. S. & B. Ry. Co.*, 6 Civ. Pro. 90.

OTHER RECEIVER.

A receiver in the State of New York may be appointed, notwithstanding the appointment of a foreign receiver, says the court. "There is a manifest distinction between a receiver of property of a corporation and a receiver of the corporation. * * * Sections 1810 and 1812 of the Code of Civil Procedure do not interfere with this power, and if they did it might well be that they would be unconstitutional as infringing the ancient jurisdiction of the court." *Popper v. Supreme Council*, 61 App. Div. 405-406; *Phoenix Foundry v. North Riv., etc.*, 6 Civ. Pro. 106; *Woerishoffer v. North River., etc.*, 6 Civ. Pro. 113.

TITLE OF RECEIVER—Continues until a court of equity in that action shall determine the question touching the funds and make a final order in the premises. *Smith v. Danzig*, 3 Civ. Pro. 127-136.

WHEN RECEIVER NOT APPOINTED.

Where the dissolution of the corporation is voluntary a receiver cannot be appointed until the granting of the final order dissolving the corporation. *In re Boynton*, 6 Civ. Pro. 342.

Sufficient facts must be presented. *State N. Y. v. Equit. Mut. F. I. Co.*, 25 Civ. Pro. 210.

NOTICE.—A receiver may be appointed by the court upon the necessity appearing *ex parte*. *Glines v. Supreme Setting order, etc.*, 22 Civ. Pro. 437.

SUPPLEMENTARY PROCEEDINGS AGAINST A FOREIGN CORPORATION.

May be maintained—"The policy of the State does not preclude the creditor of such a corporation from obtaining a preference upon assets here."—**ANDREWS, Ch.J.** *Logan v. McCall Pub. Co.*, 23 Civ. Pro. 246-251.

Cecelia L. Slater, Executor, et al., v. James Slater, Executor.

CECELIA L. SLATER ET AL., AS EXECUTORS, ETC.,
APPELLANTS AND RESPONDENTS, v. JAMES
SLATER, INDIVIDUALLY AND AS EXECUTOR,
ETC., RESPONDENT AND APPELLANT.

COURT OF APPEALS—MARCH, 1903.

§ 192.

*Practice—Appeal, by Leave of Appellate Division, From
Interlocutory Judgment.*

An appeal, by leave of the Appellate Division, from an interlocutory judgment, of any kind, to this court, is an appeal from an order in an action which should not go on the regular calendar, but either party has the right to notice it for argument and place it upon the motion calendar at his convenience.

(Rule eleven, this court.)

(Decided March, 1903.)

Motion to place an appeal upon the calendar as a preferred cause.

John A. Garver, for plaintiffs.

James W. Hawes, for defendant.

VANN, J.—This action, brought by two of the executors of a deceased copartner against the surviving member of the firm, individually and as the remaining executor, resulted in an interlocutory judgment, which, upon appeal, was modified and affirmed as modified by the Appellate Division. From its interlocutory judgment entered accordingly, the Appellate Division granted both parties leave to appeal to this court and certified two questions to us for decision. Each party thereupon appealed from that part of the judgment by which he

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felt aggrieved and both now unite in an application "for an order placing these appeals among the preferred causes on the present calendar" upon the ground that they are entitled to a preference under subdivision 5, section 791, of the Code of Civil Procedure.

The motion should be denied because it is unnecessary, as an appeal by leave of the Appellate Division from an interlocutory judgment of any kind is an appeal from an order in an action which should not go on the regular calendar, but either party has the right to notice it for argument and place it upon the Motion Calendar at his convenience.

A misapprehension seems to have arisen owing to the recent amendment of Rule 11, which formerly did not mention "appeals from interlocutory judgments overruling or sustaining demurrers," and it has been inferred by some that the judgments specifically mentioned are the only interlocutory judgments that can be placed upon the Motion Calendar. This is a mistake, as will appear from the following explanation of our purpose in amending the rule.

Prior to 1895 section 192 of the Code of Civil Procedure provided that "an appeal from an interlocutory judgment overruling or sustaining a demurrer * * * may be noticed for hearing on a motion day and heard as a motion." On the 6th of June, 1895, that section was repealed bodily by chapter 946 of the laws of that year, which was an act passed to adapt the Code of Civil Procedure to the changes made by the new constitution. This left the matter open to regulation by rule. The repeal of that section created doubt as to what calendar "an appeal from an interlocutory judgment overruling or sustaining a demurrer" should be placed upon, and to remove that doubt, on the 19th of June, 1896, we amended said rule so as to include such an appeal *co nomine*. We did not intend, however, to exclude an appeal, when duly allowed by the Appellate Division, from any interlocutory judgment, as the rule when carefully read plainly shows

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(Anderson v. Daley, 159 N. Y. 146). As our effort to end one misapprehension seems to have given rise to another, we file this memorandum to remove doubt and settle the practice.

The motion should be denied.

PARKER, Ch.J.; GRAY, O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur.

Motion denied.

WILLIAM H. ZELTNER, INDIVIDUALLY AND AS EXECUTOR, ETC., PLAINTIFF, v. THE HENRY ZELTNER BREWING COMPANY, DEFENDANT.
WILLIAM B. SUTHERLAND, AS RECEIVER OF THE PROPERTY OF THE HENRY ZELTNER BREWING COMPANY, APPELLANT; YORKVILLE BANK, RESPONDENT.

COURT OF APPEALS—MARCH, 1903.

§§ 1810, SUBD. 3, 2419-2423.

Receiver of Corporation—Resignation of Officers and Directors.

Section 1810 of the Code of Civil Procedure, which authorizes the court to appoint a receiver of a corporation having no officers, in order to preserve its property, does not contemplate that its officers and directors may resign for the purpose of throwing the company into the hands of a receiver. Their resignation, under such circumstances, is illegal, and the appointment of the receiver is ineffectual to prevent a creditor from prosecuting to judgment and collecting his claim against the company.

(Decided March, 1903.)

William H. Zeltner v. Zeltner Brewing Co.

Appeal, by permission, from an order of the Appellate Division, Second Department, reversing an order denying a motion to vacate or modify an order appointing a receiver; and modifying the order appointing such receiver.

Henry A. Forster, for appellant.

Louis Marshall, for respondent.

WERNER, J.—This is a contest for priority between a judgment creditor and the receiver of the defendant corporation. The question at issue is whether the Appellate Division properly modified the order appointing the receiver herein so as to permit the defendant Yorkville Bank to prosecute to judgment and collection its claim against the corporation. At Special Term the court denied the bank's motion to vacate or modify the order appointing the receiver, and at the Appellate Division this decision was reversed and the original order modified as stated. The proceeding comes to this court upon three questions certified by the Appellate Division, but as our answer to the first one will dispose of the only issue before us, we shall not deal with the others. The first certified question alluded to is as follows: "Were the resignations of the officers and directors (excepting the secretary) of The Henry Zeltner Brewing Company, for the purpose of enabling this action to be brought, and a receiver of the property of the corporation to be appointed, legal or effective?" No intelligent answer to this question can be made without reference to the history behind the resignations therein mentioned. The defendant corporation was organized in 1892. Its business was the manufacture and sale of beer and other malt beverages. Its capital stock was \$300,000 divided into 3,000 shares of \$100 each. The plaintiff was the holder, in his own right, of 500 shares, and the holder of 2,483 shares as executor under his father's will. Other members of the Zeltner family held fifteen shares, and the remain-

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ing two shares stood in the names of employees. Prior to 1900 the business of the corporation had been profitable, but in that year it began to decline and thus continued until February, 1902, when the corporation owed \$332,500 upon mortgages and taxes, and \$197,000 to unsecured creditors. Some of these debts had matured and were being pressed in amounts far in excess of the ready assets of the corporation. Actions had been commenced and others were threatened. These were the conditions, on February 1, 1902, when all of the officers of the corporation, except the secretary, and all of the directors resigned their offices. Straightway this action was instituted upon a complaint in which the allegations of insolvency of the corporation are alternated by statements showing that if its affairs should be carefully administered under the direction of the court, enough might be realized to pay its creditors and stockholders in full, and which frankly declares that the officers and directors of the corporation deemed it their duty to resign so that the beneficent aid of the court could be invoked. Thereupon a receiver of the corporation was appointed under the provisions of sec. 1810 of the Code of Civil Procedure, which, so far as material here, reads as follows: "A receiver of the property of a corporation can be appointed only by the court and in one of the following cases. * * * (Subd. 3): An action brought by the attorney-general, or by a stockholder to preserve the assets of a corporation, having no officer empowered to hold the same."

The order appointing the receiver clearly shows that his duties and powers were not limited to the mere preservation of the corporate assets, but he was invested with all the ample powers usually conferred upon receivers in proceedings to dissolve corporations and wind up their business, and this with such good effect that at last accounts he was doing a very profitable business. Subdivision 3 of section 1810, above quoted, seems to have no history anterior to 1870, when it was imported into the Code by chapter 151 of the laws of

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that year. In view of this lack of antecedents it is impossible to say much more of this subdivision than that it means just what it says. It was evidently intended to provide for the exigencies which must arise when a corporation is without officers to conduct its business or preserve its assets. Such a condition might grow out of one or more of any number of supposable causes which it will not be profitable to specify here. It is enough to say that, while the language of the subdivision is broad enough to cover every case in which a corporation is without officers, we do not think it was ever designed to permit the latter to abandon their posts of duty and abdicate their official functions for the express purpose of shifting their burdens to the shoulders of the courts. Officers of corporations are charged with certain duties, and among them is the primary duty of preserving their assets. To say that the Legislature intended that such an obvious duty can be disregarded for the express purpose of inviting judicial interference in the conduct of corporate affairs would be to impute to the law-making power a lack of both intelligence and morality, for such action would, in many instances, amount to a fraud upon the courts, upon stockholders, creditors and the general public. If the authority for the resignations under discussion is not created by the subdivision of the statute above quoted, it will be manifestly impossible to justify the action of the officers of the defendant corporation upon any other ground than that of their inherent right to resign. The provisions of the Code relating to appointments of receivers in proceedings to dissolve insolvent corporations expressly confer upon the directors of officers or corporations as such the right to apply for the very relief which was, in effect, granted to the plaintiff herein. When the stock, effects and property of a corporation are not sufficient to pay all its just demands or to afford a reasonable security to those who may deal with it, or if for any other reason the interests of the stockholders require it, the officers of the corporation may ask for its dissolution and for the appointment of a receiver

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(chap. 17, tit. 11, secs. 2419-2423, Code Civ. Pro.). In such a case, as will be observed, the officers are not required to resign, but the action is to be instituted by them in their official capacity. There are other forms of actions, by and against corporations and their officers, in which receivers may be appointed, but they are not germane, and to cite them would serve to confuse rather than enlighten us in the consideration of the case at bar. When we come to consider the general right of officers and directors of corporations to resign, we are at once reminded of the limitations of the question certified to us. We may admit, for the purpose of this discussion, that as a general rule such officers may resign at will, and that the validity of such resignations does not depend upon their formal acceptance (*Manhattan Co. v. Kaldenberg*, 165 N. Y. 1; *Noble v. Euler*, 20 App. Div. 549). But here the question is whether the resignations of all the officers and directors of the defendant corporation, "for the purpose of enabling this action to be brought and a receiver of the property of the corporation to be appointed," are legal and effective. As we have already said, we do not think the provisions of subdivision 3 of section 1810 of the Code were intended to cover such a case, nor do we believe, independently of the statute, that any rule of law or morals can justify the simultaneous resignation of all of the officers of a corporation for the purpose of enabling one of their number to go into court and say that the corporation is without officers to preserve its assets. In a close corporation like the one at bar such a proceeding may do no real harm, but it can easily be understood how much evil might result if it were to be engrafted upon the law of corporations. Indeed, the situation here furnishes a mild illustration of what might be possible if such omnibus resignations, made for such purposes, should receive the sanction of the courts. A corporation might be mismanaged almost, but not quite, to the verge of insolvency, and then, when creditors become anxious and importunate, its unfaithful officers could resign in a body and thus make their own wrong or

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incapacity a legal obstacle to the prompt and regular enforcement of just claims against the corporation. The law has gone far enough in the protection of corporations by providing that, when they are solvent, creditors may be compelled to accept ratable payment upon their claims. It should not go further and declare that, whether insolvent or not, corporations may escape or delay the payment of their just obligations. Morawetz in his work on Corporations (vol. 1, sec. 563) supports the view above expressed with the statement: "It seems clear, also, that directors cannot terminate their agency or accept the resignation of others if the immediate consequence would be to leave the interest of the company without proper care and protection." Two decisions in this State must be noticed, although neither is directly in point. In *Smith v. Danzig* (64 How. Pr. 320) Mr. Justice Pratt, at Special Term, held that the directors of a corporation may lawfully resign when it is evident that it is going from bad to worse, and when such action is necessary to secure a fair and equal distribution of the corporate property among creditors. It is to be noted that, although that decision was made in 1883, it contains no reference or allusion to subdivision 3 of section 1810, which was first enacted in chapter 151, Laws of 1870, and that when it was made and until 1889 there was no provision for the appointment of a temporary receiver in an action for the voluntary dissolution of a corporation (L. 1889, chap. 314). That case is, therefore, not an authority applicable to the present state of the law. In *Carnaghan v. Exp. & Prod. Oil Co.* (32 N. Y. St. Rep. 1121) Mr. Hornblower, as referee, quotes with approval the foregoing statement of Mr. Morawetz, but decided that the resignations then before the court were illegal upon other grounds.

Our conclusion is that the certified question above set forth must be answered in the negative, and, as that is decisive of the case, the others need not be answered. As the order below is here only on the receiver's appeal, it must be affirmed, with costs.

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PARKER, Ch.J.; O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur.

Order affirmed.

See same case below, decision in Appellate Division, 33 N. Y. Civ. Pro. 298.

JOHN M. HARRINGTON, PLAINTIFF-RESPONDENT,
v. LAURA BAYLES, DEFENDANT-APPELLANT.

SUPREME COURT—APPELLATE TERM—APRIL, 1903.

§ 3297.

Compensation of Referee—Action to Foreclose Mortgage.

A referee appointed in an action to foreclose a mortgage to conduct the sale of the mortgaged premises, may be entitled both to fees and commissions as his compensation. The fees are determined differently in different parts of the State; in New York County by section 1088 of the Consolidation Act. The commissions are uniform throughout the State and are determined by section 3297 of the Code of Civil Procedure; the referee is entitled to commissions only when a sale has taken place.

Such a referee is not entitled to recover as a disbursement fees paid to an auctioneer for adjourning the sale.

(Decided April, 1903.)

Appeal by the defendant from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Eleventh District, rendered in favor of the plaintiff upon a trial had before the court, without a jury.

Alfred Pagelow, for appellant.

John M. Harrington, respondent in person.

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GIEGERICH, J.—The action is to recover fees for services rendered by the respondent, as referee, under a judgment of foreclosure and sale in an action in which the appellant was the plaintiff, and for auctioneer's fees paid therein by the respondent.

The pleadings were written. The complaint contained two causes of action; one for services rendered as such referee at the appellant's request, the value of which was placed at \$50, and the other for fees of an auctioneer amounting to \$15, which the respondent claims were paid by him as a disbursement in connection with his duties as such referee. The answer put in issue the allegations as to the rendition and value of the services and, for a separate defense, set up that a sale of the premises never took place, and that in consequence thereof neither the respondent nor the auctioneer became entitled to any fees whatever.

It appears from the evidence elicited and the admissions made at the trial that the respondent was served with a certified copy of the judgment by the representative of the attorneys for the plaintiff in such foreclosure action; that the respondent selected an auctioneer, caused the notice of advertisement of sale to be published, and on the day fixed for the sale attended at the place where the premises were to be sold, and at the request of the plaintiffs' attorney in such action adjourned the sale to a subsequent date, and that when that date arrived he again attended, and upon the like request adjourned the same, and that in the meanwhile the owner of the equity of redemption offered, and the respondent accepted, the full amount of such judgment, including costs. The respondent subsequently demanded payment of his fees, but no part thereof was paid.

Testimony was also given to the effect that the sum paid to the auctioneer by the respondent for adjourning the sale was reasonable.

At the trial the appellant contended that under section 1088 of the Consolidation Act the respondent was not entitled to

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any fees whatever, but the justice held that the point was not well taken and gave judgment in the latter's favor for the full amount claimed, and an appeal was taken to this court.

When the appeal was reached for argument, the respondent claimed that it was in the same position as if it had been actually dismissed, by reason of the appellant's failure to argue the appeal at the December Term, as required by the order granted herein on October 22, 1902, upon a motion to dismiss the appeal for failure to file a return. While it is true that the appeal was not argued at such term, it is equally true that the argument thereof was for a good and sufficient reason postponed until the present term without prejudice to the rights of the appellant, and under such circumstances we had no alternative but to overrule the objection and direct that the argument of the appeal proceed. The respondent thereupon refused to take any further part in the appeal, and it is to be regretted that such important questions as are presented have to be decided without the assistance of either an oral argument or a brief in his behalf.

It was said by the court in *Innes v. Purcell* (2 T. & C. Rep., at page 539), in speaking of the fees of a referee:

"It has always been the policy of the law to prescribe and fix the compensation which may be demanded for the performance of legal duties by public officers. And where no provision has been made, either directly or indirectly, no fees can lawfully be demanded. Costs and fees are recoverable by virtue of statutory authority, and where no such authority exists, no claim for their recovery can be strictly maintained," citing *Downing v. Marshall* (37 N. Y. 380).

The question thus arises whether there is any statute fixing the fees of a referee in foreclosure sales in New York County, and if so, at what rate. In order to obtain a thorough understanding of the situation, it becomes necessary to examine the various statutes which were passed before the provisions of the Consolidation Act above referred to were enacted, and the decisions construing such statutes.

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Prior to the adoption of the Constitution of 1846, mortgages were foreclosed by action in the Court of Chancery and the sale was made under the direction of a master in chancery. His fees for performing certain services were prescribed with great particularity by the Revised Laws and subsequent enactments. Thus, under the Revised Laws of 1813 (I. R. L., pp. 5, 6, sec. 1), he was entitled to 50 cents for drawing the advertisement or public notice of sale, \$1 for attending and adjourning sale, \$5 for preparing and executing a deed to the purchaser, and such further allowance by way of commissions as the chancellor judged to be reasonable. Besides these fees the master was allowed the printers' bills.

These provisions, except those relating to an additional allowance, were incorporated into the Revised Statutes (I. I. R. S., Part III, chap. X, title III, sec. 7, pp. 625, 626).

The latter provided for the allowance by the chancellor of commissions, not exceeding the sum of \$20, after notice given to the party to be charged therewith.

These provisions remained in force until 1880, when they were repealed (chap. 245, page 368).

The fees allowed by the Revised Statutes were materially reduced by chapter 342 of the Laws of 1840, but such act was repealed in the following year (Laws of 1841, chap. 237).

The Constitution of 1846 having abolished the office of master in chancery, as well as the court itself, the Judiciary Act of 1847 (chap. 280) was passed in order to meet the necessities arising from the changes thus made. Section 77 thereof, among other things, provided that, after the first Monday of July of that year, sheriffs might sell any lands in their respective counties ordered to be sold by decree of any court of record in the State, and give conveyance thereof in the same manner and with like effect as was then done by a master in chancery and for that service; it was further provided that, in addition to his disbursements for printers' fees he should be entitled to receive the same fees as upon sales

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by virtue of an execution, but that the whole should in no case exceed the sum of \$10.

The foregoing provisions were repealed by the Laws of 1877 (chap. 417, page 471), and by the Laws of 1880 (chap. 245, page 370).

In 1869 an act (chap. 569) relating exclusively to the City and County of New York was passed. Since this is the source of various subsequent enactments relating to the fees of officers authorized to sell lands in foreclosure actions as well as in actions of partition, it is herewith set forth in full:

"Section 1. All sales of real estate hereafter in the City and County of New York under the decree or judgment of any court of record (except sales in cases of partition, and where the sheriff of said city and county is a party) shall be made by the sheriff of said city and county.

"Sec. 2. In cases of sales on foreclosure, he shall be entitled to receive the following fees and no more: For receiving order of sale and posting notices of sale, \$10; for attending sale, \$10; for drawing each deed of premises sold, \$5; for attending and adjourning a sale at the request of the plaintiff in the action or by order of the court, \$3, but no more than three such adjournments in one action shall be charged for; for making report of sale, \$5; for paying over surplus moneys, \$3. And all disbursements made by him for printers' fees at the rate allowed by law therefor, fees of officers for taking acknowledgments and administering oaths, and for internal revenue stamps affixed to conveyances executed and delivered by him, and all auctioneers' fees actually paid by him, but not to exceed for such auctioneers' fees \$12 for each parcel separately sold, which auctioneers' fees shall be paid by the purchaser of the parcel in addition to the amount bid by him therefor.

"Sec. 3. In cases where there is no other officer to whom, according to the provisions of law, a police justice may direct a commitment, and when no such officer is present, such police justice shall direct the same to the sheriff of said city and

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county, who shall be entitled to receive such fees for his services therefor, not exceeding 50 cents on each commitment, as shall be allowed by the supervisors of the County of New York.

"Sec. 4. In cases of sales in actions of partition by referees appointed by the court, they shall be entitled to receive the same fees and disbursements as are allowed by section 2 hereof to the Sheriff of the City and County of New York, and in addition thereto commissions on all moneys received and paid out by them, at the same rate as are allowed by law to executors and administrators. Provided, however, that the commissions allowed by this section shall not, in any case, exceed the sum of \$500."

Section 1 of the foregoing provisions was amended by chapter 192 of the Laws of 1874, as hereafter shown, and as thus amended, it, together with section 2, has been included in section 1088 of the Consolidation Act; section 3 was repealed by the Laws of 1874 (chap. 192) and by the Laws of 1881 (chap. 537, page 772), and section 4 was repealed by the Laws of 1880 (chap. 245, page 372) (see Silvernail's Index to the Laws of New York from 1775 to 1897, p. 537), but its provisions were modified and embodied in section 3297 of the Code of Civil Procedure (see Throop's Ann. Code of 1891, p. 901).

As above noted, section 1 of the foregoing act was amended and section 3 thereof was repealed by chapter 192 of the Laws of 1874, the former, as thus amended, reading as follows:

"Sales of real estate hereafter made in the City and County of New York, under the decree or judgment of any court, may be made by the sheriff of said city and county, or by a referee appointed for that purpose, by such judgment or decree; but when any sale is made by any officer other than the sheriff no greater sum shall be charged or allowed as fees than is prescribed in section 2 of this act."

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By the act of 1876 (chap. 431, sec. 11, page 456) section 309 of the Code of Procedure was, among other things, amended by adding the following provision:

“Nor shall a greater sum than \$50 be charged by or allowed to any sheriff, referee or other officer for his fees, percentage or services for any sale under a decree or judgment of foreclosure.”

On the first day of September, 1880, sections 1496 to 3356, both inclusive, comprising Chapters XIV to XXII, inclusive, of the Code of Civil Procedure went into effect. Among these is section 3297, which, as amended by subsequent enactments, reads as follows:

“The fees of a referee appointed to sell real property, pursuant to a judgment in an action, are the same as those allowed to the sheriff, and he is allowed the same disbursements as the sheriff. Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of \$10. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed \$50, unless the property sold for \$10,000 or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause, \$500.”

This section is said by Mr. Throop to have been taken from the Laws of 1869 (chap. 569, sec. 4), as amended by chap. 192 of the Laws of 1874; and sec. 309 of the Code of Procedure, as amended by the Laws of 1876 (chap. 431, *supra*). (Throop's Ann. Code of 1891, page 901).

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In 1882 the Consolidation Act (chap. 410) was enacted, sec. 1088 above referred to reading as follows:

"Sales of real estate hereafter made in the City and County of New York, under the decree or judgment of any court, may be made by the sheriff of said city and county, or by a referee appointed for that purpose, by such judgment or decree; but when any sale is made by any officer other than the sheriff, in an action of foreclosure, no greater sum shall be charged or allowed as fees than the following: In cases of sale on foreclosure, the sheriff shall be entitled to receive the following fees and no more; for receiving order of sale and posting notices of sale, \$10; for attending sale, \$10; for drawing each deed of premises sold, \$5; for attending and adjourning a sale at the request of the plaintiff in the action or by order of the court, \$3; but not more than three such adjournments in one action shall be charged for; for making report of sale, \$5; for paying over surplus moneys, \$3; and all disbursements made by him for printers' fees at the rate allowed by law therefor, fees of officers for taking acknowledgments and administering oaths, and all auctioneers' fees actually paid by him, but not to exceed, for such auctioneers' fees, \$12 for each parcel separately sold, which auctioneers' fees shall be paid by the purchaser of the parcel in addition to the amount paid by him therefor."

The foregoing provisions were taken from the Laws of 1869 (chap. 569, secs. 1 and 2), as amended by the Laws of 1874 (chap. 192). (See Laws of 1880, volume II, page 303, marginal note; Silvernail's Index, *supra*, and are unaffected by the Greater New York Charter, Ash's Greater New York Charter, LXI).

Before passing to the consideration of the question whether the foregoing section has been superseded, it becomes necessary to consider the same, as well as the other enactments upon the subject, in the light of the decisions which have been handed down from time to time. In 1840, while the act passed in that year (chap. 342) was in force, the chancellor,

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in construing its provisions, held that the restriction contained in such act that no other fees whatever than those therein prescribed should be taxed or decreed against the defendant or demanded or received from him, did not have the effect of excluding the power to award commissions provided for by the Revised Statutes (*Delavan v. Payn*, 8 Paige's Ch. Rep., p. 459).

In the case cited, the chancellor, in discussing the effect of said act upon the commissions allowed by the Revised Statutes, among other things, said, at page 460:

"The question therefore arises, whether the term *fees*, as used in that act, includes the compensation allowed by the former statute, by way of commissions upon * * * moneys received and paid over by masters, and other officers of the court. By referring to the General Fee Bill in the Revised Statutes, it will be seen that the master's fees upon sales in this class of mortgage cases were very much reduced by the Act of May, 1840, so as to give him a very trifling compensation for his services in advertising the property, attending the sale and drawing the deed and report; exclusive of his risk and responsibility in receiving and paying out moneys. I cannot, therefore, believe that the Legislature intended, in that act, to deprive the master of the commissions which were allowed to him under the Revised Statutes. The provision in the Revised Statutes authorizing the master to charge for disbursements and for commissions upon sales is contained in the same clause of the section of the statute relative to master's fees. And as neither the commissions nor the disbursements are, in common parlance, or even in technical language, called *fees*, if the master is not allowed to retain his commissions upon sales under the recent act, it is difficult to say upon what principle he can be permitted to retain for his disbursement for the printer's bill. I conclude then that the term *fees*, in the act of May last, was intended to deprive the master of his commissions."

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That decision was followed in *Innes v. Purcell* (*supra*), decided in the year 1874, wherein the General Term of the First Department, reversing an order allowing \$100 to a referee appointed to sell in a foreclosure action, held that the power to allow commissions provided by the Revised Statutes still continued, notwithstanding the Act of 1847 limited the fees to the amount of \$10, and also, in construing section 287 of the Code of Procedure, as amended by the Laws of 1851, appendix 95, directing that real estate adjudged to be sold must be sold by the sheriff of the county or by a referee appointed for that purpose, and that thereafter the sheriff or referee must execute a conveyance which shall be effectual to pass the rights and interest of the parties adjudged to be sold, held that the referee appointed to sell in such an action is entitled only to the same amount allowed by law to the sheriff for the performance of a similar duty.

In *Ward v. James* (8 Hun, 526), decided in October, 1876, a gross sum of \$50 was allowed the referee in a foreclosure action where the property was not sold, although advertised for sale, and it was held that the court below had no power to award it.

In *Walbridge v. James* (16 Hun, p. 8) the property was situated in a county other than New York, and it was held by the General Term of the Third Department in November, 1878, that the effect of the limitation placed by section 309 of the Code of Procedure was to fix the maximum of fees, and that such limitation stood at \$50 instead of \$10 fixed by the former statute, but that it expressly covered both fees and percentage. It was further held that where a sale was for any reason ineffectual the referee was entitled under the circumstances to 50 cents for receiving and entering the decree, and \$2 for advertising the property for sale. The former fee appears to have been warranted by chapter 415, Laws of 1871, entitled "An act in relation to the fees of sheriffs except in the Counties of New York, Kings and Westchester," and the

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latter by Part III, chapter X, title III, section 38 of the Revised Statutes.

It should be observed that all these decisions were promulgated subsequent to the decision in *Gaskin v. Meek* (42 N. Y., page 186), in which it was held that the Act of 1869 was unconstitutional because it violated the provisions of the constitution prohibiting the passage of a private or local act containing more than one subject and requiring that it be expressed in the title.

The amendment of 1874 having obviated the constitutional objection, the constitutionality of the act in question was finally sustained by the decision of the Court of Appeals in *Richards v. Richards* (76 N. Y. 186), in 1879.

It was held by the Monroe County Special Term in *Birge v. Ainsworth* (59 How. Pr., page 473), in March, 1880, that the poundage of referees in cases of sales on foreclosure was limited to \$10, and was not increased by the Act of 1876 amending section 309 of the Code of Procedure, and that said amendment did not give the right to such fees or poundage, but that it was merely a limitation of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions.

In the same month and year it was held in *Schermerhorn v. Prouty* (80 N. Y. 317), that the only effect the Act of 1876 amending section 309 of the Code of Procedure had upon the Act of 1869 was to fix a maximum of fees; that the latter was a local act and the amendment to the Code was a general law, not inconsistent therewith, except so far as it modified it in the respect hereafter mentioned, and that such act regulated the fees of the sheriff or referee on foreclosure sales in the City and County of New York, subject only to the limitation in the Act of 1876 that in no case shall they exceed \$50.

It will be seen from the foregoing enactments and decisions that when section 3297 of the Code of Civil Procedure above cited went into effect, the fees allowed for services rendered on foreclosure sales were not uniform throughout the State,

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but that, so far as the County of New York was concerned, such fees were measured by the Act of 1869; that besides these fees commissions not exceeding \$20 might be allowed under the Revised Statutes to the officer making the sale; that section 309 of the old Code, as amended by the Act of 1876, did not give the right to the sum of \$50, but only fixed the maximum of fees, percentage and services at that sum, leaving unchanged the scale of charges, up to this limit, as fixed by the various enactments, general or special, affecting the county where the real property was situated.

It might be argued with considerable plausibility that section 2 of the Act of 1869, relating to fees on foreclosure sales, has been repealed or superseded by the provisions of the Code of Civil Procedure, and stress might be laid especially upon the language of the first sentence of section 3297 that the fees of a referee are the same as those allowed to the sheriff. Such words, however, merely indicate that the fees allowed to the sheriff for selling real property pursuant to a judgment in an action when the said section went into effect were left unchanged; in other words, the various provisions for quantity or amount of sheriff's fees, whether general or local, were left unaffected. The words "the sheriff" as used in section 3297 clearly refer to the sheriff of the county where the real property ordered to be sold is situated, and not to sheriffs generally. The foregoing views are strengthened by the language of section 3308 of the Code of Civil Procedure, which is as follows: "The last section (regulating sheriff's fees), except the limitation of amount contained in subdivision eleventh thereof, does not affect any special statutory provision, remaining unrepealed after this title takes effect, relating to the fees and expenses of the Sheriff of the County of New York, or the Sheriff of the County of Kings."

The sheriff's fees on foreclosure in the County of New York, as already observed, were then regulated by section 2 of the Act of 1869, which has not been specifically repealed, but on

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the contrary its provisions have been included in section 1088 of the Consolidation Act.

From what has preceded, it is clear that section 2 of the Act of 1869 must be regarded as having been engrafted upon section 3297 of the Code of Civil Procedure and, therefore, that the former, which, as above noted, is a local act, instead of section 3307 of the Code of Civil Procedure, which relates to the fees of sheriffs generally, regulated the fees of the sheriff as well as referees on foreclosure in the County of New York when section 3297 went into effect, in 1880.

These views are further supported by the conclusion reached by the late Court of Common Pleas in the case of *Lockwood v. Fox* (1 Civ. Pro. 407, 61 How. Pr. Rep., 522). There, as here, the action to foreclose a mortgage was settled by the parties after advertisement and before the sale. Before the settlement the defendant tendered to the referee the sum of \$10, claiming that to be the proper amount under the Act of 1869 for receiving the order of sale and printing the notices of sale. The referee declined to accept this amount, claiming that his fees were regulated by the Code of Civil Procedure, and that thereunder he was entitled to poundage on the amount paid in settlement of the judgment, and moved to tax his fees. The court at Special Term sustained the referee, but reduced his fees to \$50. The defendant appealed to the General Term, which reversed the order, and held that the statute of 1869 was a local act, and therefore was unaffected by virtue of section 3308 of the Code of Civil Procedure, and that, as the referee's fees must be taxed under said act, he was entitled to only the sum of \$10.

The court, in the case just quoted, among other things said:

"It is apparent, from examination, that referee's fees must be taxed, under chapter 569 of the Laws of 1869, as amended by chapter 192 of the Laws of 1874, unless a change has been made by the provisions of the Code of Civil Procedure (*Schermerhorn v. Prouty*, 80 N. Y. 317). There was no direct repeal of the specified enactments by the repealing acts. The

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statute of 1869, being a local act, is, therefore, unaffected, by virtue of section 3308, Code of Civil Procedure, to which the attention of the learned justice in the court below could not have been directed."

The principle laid down in the foregoing case was reiterated by the same court in *Brady v. Kingsland* (67 How. Pr., page 168), and these decisions may therefore be regarded as authorities for taxing the fees of a referee, in foreclosure cases, under the Act of 1869, as included in section 1088 of the Consolidation Act, instead of the Code of Civil Procedure, unless a change has been made by the provisions of the act "in relation to the office of the Sheriff in the City and County of New York" (Laws of 1890, chapter 523, and amendments thereof).

It cannot be fairly claimed, from a reading of the Act of 1890, that it either superseded or in any way affected the Act of 1869, or section 1088 of the Consolidation Act, which continued the portion in question. The enactment of 1890 does not provide for a direct repeal of either of such enactments, and from the view expressed by the Appellate Division of the First Department in the case of *Keim v. Keim* (43 App. Div., page 88) the measure of a referee's compensation in a partition suit is not to be found in the Act of 1890. The court in that case said:

"We have said that the special act in question took the Sheriff of the County of New York out of the area of the general act. The effect of this, however, was not to deprive referees appointed to sell real property in this county of any fees. Section 3307 may still be resorted to for the purpose of ascertaining the proper allowance to a referee under section 3297. The former section no longer governs as between litigants and the sheriff, but the referee's compensation may be computed thereon quite as though the percentage specified therein had been literally embodied in section 3297."

This, we think, must be regarded as overruling the conclusion reached in *Schierloh v. Schierloh* (22 Misc. 637) that

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the fees of a referee in an action of dower, and in *Hover v. Hover* (25 Misc. 95), that the fees of a referee in an action to foreclose a mortgage where over \$3,000 as earnest money upon the sale was received by him, but which he was compelled to return to the purchaser because the title proved unmarketable through a defect of parties to the record, are controlled by the New York County Sheriff's Law of 1890.

While the remarks above quoted were made in an action for partition, they must, by analogous reasoning, be held to apply to an action for the foreclosure of a mortgage and exclude the Act of 1890. Neither does section 3307 of the Code of Civil Procedure, as above noted, apply in foreclosure sales in New York County (*Lockwood v. Fox*, *supra*; Code of Civil Procedure, sec. 3308).

Moreover, it is apparent from a reading of the Act of 1890, that the Legislature did not intend to adapt the fees allowed by section 3297 of the Code of Civil Procedure to a salaried system in which the fees became primarily the property of the county and are returned to the sheriff *in part*, as an incident to his salary.

Section 17, subdivision 11 of the Act of 1890 contains the following provision: "For posting and publishing the notice of sale, selling and conveying real property in pursuance of a direction contained in a judgment, the like fees as for the same services upon the sale of real property by virtue of an execution, but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation shall not exceed \$50."

The only fees provided for the services enumerated in the beginning of the foregoing provisions are set forth in subdivisions 8 and 9 of the same section, and they are as follows: For advertising real property, \$2.50 where the amount of the judgment is less than \$1,000, and \$5 in all other cases (subd. 8); for making duplicate certificates of the sale of real property by virtue of an execution, 25 cents for each folio,

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and for drawing and executing a conveyance upon a sale of real property, \$5, to be paid by the grantees (subd. 9).

The act in question, however, is silent as to the following services specified in section 2 of the Act of 1869, as continued in section 1088 of the Consolidation Act, and for which compensation is therein provided, viz: Attending sale; attending and adjourning sale at the request of the plaintiff; making report of sale and paying over surplus moneys.

It was not and could not have been within the intention of the Legislature, in enacting the law under review, to deprive referees of their fees for performing these services in foreclosure actions. Such is not a fair and reasonable construction of the act in question. It should rather be inferred from these very omissions that the law-making power did not intend, by enacting the provisions above quoted, to supersede section 1088 of the Consolidation Act, which fixes the fees of the sheriff as well as of referees in such cases on sales in foreclosure actions, but only intended to affect the sheriff's fees for services rendered under a judgment other than one of foreclosure and sale.

Recourse must, therefore, be had to that part of the Consolidation Act, above cited, which, as above stated, superseded section 2 of the Act of 1869, and relates directly and exclusively to fees on foreclosure sales, and, therefore, governs the disposition of the questions arising with respect to the respondent's fees as referee.

It will be observed that the term "fees" is used, instead of "compensation." The distinction between these terms as well as the term "commissions" was pointed out by the chancellor in *Delavan v. Payn* (*supra*), and it has ever since been recognized and applied in statutes passed, and in decisions handed down subsequent to the enactment of the Revised Statutes, and including the Act of 1869, as well as section 3297 of the Code of Civil Procedure (see *Innes v. Purcell*,

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supra; Guinivan v. Carroll, 4 Law Bull., p. 6; Richards v. Richards, *supra*; Hobart v. Hobart, 86 N. Y. 636; Race v. Gilbert, 102 N. Y. 298).

Upon turning to the latter, it will be seen that provision is there made for the allowance to the referee of certain commissions when he is required to take security upon a sale or to distribute or apply or ascertain and report upon the distribution or application of any of the proceeds of the sale; but that commissions shall not be allowed upon a sum bidden by a party and applied upon that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of \$10. Under these provisions a payment of the proceeds to the parties entitled, in accordance with their respective rights, in a "distribution" of such proceeds; and a payment upon incumbrances "applies" the sum paid thereon, so as to entitle the referee to such additional compensation by way of commissions (Race v. Gilbert, *supra*).

In the case just cited, the Special Term struck out the item of commissions and the General Term, in affirming the order, held that the referee, under the circumstances above mentioned, was entitled to receive the same fees as a sheriff does upon the sale of real estate under an execution, viz: Three per cent. on a sum not exceeding \$250, and two per cent. on the residue. The Court of Appeals, however, reversed so much of the order of the General Term as denied the right to commissions for distributing and applying as above defined.

In their note to section 3297 the commissioners say that they made the provision regulating the commissions general instead of limiting it to partition, but that the Legislature reduced the amount of the referee's commissions to one-half of the commissions of executors (Throop's Ann. Code of 1891, page 901). It will be recalled that the provisions with respect to commissions were taken from section 4 of the Act of 1869, which, as already stated, related only to partition suits and allowed the full commissions of executors.

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As above pointed out, however, a limitation upon the amount of a referee's compensation, including commissions, in an action to foreclose a mortgage, is expressly imposed by the concluding sentence of section 3297.

It will thus be observed that the first sentence of section 3297, allowing a referee appointed to sell property pursuant to a judgment in an action the same fees as those allowed to the sheriff, is not, as might appear at first blush, the only provision which is contained in the entire section for his compensation for services so rendered. On the contrary, the portions immediately following those referred to provide for commissions for moneys received, distributed or applied as well as fees for rendering certain enumerated services, which in an action to foreclose a mortgage would, as seen, include the receiving of the order of sale and the posting of notices of sale, attending the sale, drawing the deed of the premises sold, attending and adjourning the sale, the making of the report of sale and the paying over of surplus moneys (*Richards v. Richards, supra*; *Hobart v. Hobart, supra*; *Race v. Gilbert, supra*).

The services last mentioned are those for which "fees" are allowed. For certain other services, viz, "to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale" (sec. 3297) the referee is entitled to "commissions." The "fees" are determined differently in different parts of the State; in New York County by section 1088 of the Consolidation Act, as above shown. The "commissions" are uniform throughout the State and are determined by section 3297 of the Code.

That commissions are allowed to referees in foreclosure, as well as in partition, is obvious not only from the statement of the revisors above quoted that they had made the provisions for commissions general instead of limiting them to partition, but also from the express language of the section, as

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follows: "A referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed \$50 * * *, or in any other case \$500."

It is equally plain, however, that the referee is not entitled to such commissions where a sale has not taken place (*Walbridge v. James, supra*; *Lockwood v. Fox, supra*).

The court, in the first cited case, adverting to the commissions of the referee in an ineffectual sale, at page 13 said: "He can have commissions only on the consummated sale. He can have commissions only on such moneys as were actually or constructively received and paid over under the decree."

This being our view of the law, the plaintiff, under the circumstances disclosed, was entitled to charge only for the following services:

For receiving and posting notices of sale	\$10
For two attendances and adjournments of the sale at the request of the plaintiff in the fore- closure action, \$3 each	6
Total	\$16

The remaining question relates to the auctioneers' fees, amounting to \$15, which the plaintiff testified he paid to the auctioneer for having upon two occasions adjourned the sale. These fees were not a proper charge (*Ward v. James, supra*, at page 527), and it was error for the justice to allow them.

As a result of the foregoing considerations it follows the judgment must be modified by reducing the recovery for damages from \$65 to \$16, which latter sum, with the sum heretofore awarded for fees, extra costs and prospective fees, amounts in all to the sum of \$36.15 damages and costs, and as so modified affirmed, but without costs of this appeal to either party as against the other.

FREEDMAN, P.J., and GILDERSLEEVE, J., concur.

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Judgment modified by reducing the recovery for damages from \$65 to \$16, which latter sum, with the sums heretofore awarded for fees, extra costs and prospective fees, amounts to the sum of \$36.15 damages and costs, and as so modified affirmed, but without costs of this appeal to either party as against the other.

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SOHN, APPELLANT, IMPLEADED WITH AN-
OTHER.

COURT OF APPEALS—APRIL, 1903.

§§ 484, 497.

*Demurrer to Complaint Overruled—Held That Causes of Action Had
Not Been Improperly United.*

A complaint may be defective in clearness of statement, or in logical order, and the plaintiff may not be able at the trial to prove his case, as stated.

The objection must be determined upon a view of the whole complaint reasonably construed with reference to the facts stated and every reference flowing from such facts.

A word, a phrase, or a sentence, in a complaint, is not to be fastened upon and given a meaning; it will not fairly bear in order to sustain the demurrer.

Every reasonable and fair intendment is to be made in support of the pleading.

(Decided April, 1903.)

H. Whitney Tew, Respondent, v. Henry Wolfsohn, Appellant.

Appeal from an order of the Appellate Division overruling demurrer of the defendant. Reported below, 33 N. Y. Civ. Pro. 278.

Benno Loewy, for appellant.

Gilbert Ray Hawes, for respondent.

O'BRIEN, J.—The plaintiff sought to recover damages from the defendants, husband and wife, for breach of a contract. The plaintiff alleges that he is a professional singer and that a contract of employment was made with him. The husband alone has demurred to the complaint upon the sole ground that several causes of action have been improperly united in the complaint. The court overruled the demurrer and the order was affirmed on appeal. The case comes here upon appeal with a question certified, which, in substance, is, whether the complaint is open to the objection stated in the demurrer.

There are numerous questions that sometimes arise upon pleadings with which we are not at all concerned in the disposition of this case. The complaint may be defective in clearness of statement or in logical order, and the plaintiff may not be able at the trial to prove his case as stated. The objection must be determined upon a view of the whole complaint reasonably construed with reference to the facts stated, and every influence flowing from such facts. We are not to fasten upon a word, a phrase or a sentence in the complaint, and give it a meaning which it will not fairly bear, in order to sustain the demurrer. Every reasonable and fair intendment is to be made in support of the pleading (*Zabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 id., 14, 23; *Sanders v. Soutter*, 126 id., 193; *Sage v. Culver*, 147 id., 241). It may very well be that the complaint does not state any cause of action whatever against the husband, but he raises no such objection now, but reserves it, as he may, to be made at the trial. His objection really is that it *does* contain a good cause of action against him.

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It is provided by section 497 of the Code of Civil Procedure that when a demurrer to the complaint is allowed, on the ground that two or more causes of action have been improperly united, the court may direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated. This plainly implies that, in order to sustain a demurrer on this ground, the complaint must contain two or more causes of action so well stated and so complete and perfect that the court can divide them into the necessary number of actions. It will not do to say that the complaint contains one good cause of action and some vague and ambiguous words or expressions that, by construction, may be made to point to another cause of action. All that must be corrected, not by demurrer, but by motion. So that, in order to sustain the demurrer in this case, we must find two causes of action plainly stated, each in itself complete and perfect upon a fair and reasonable construction of the language employed. The complaint, in form and upon its face, does not profess to state more than one cause of action. It all relates to one subject, although divided into eight clauses or paragraphs, but no reference is anywhere made to a second cause of action as such. The only words that can possibly be claimed to point to more than one cause of action are to be found in the second and third paragraphs, which read as follows, the italics being our own: "That the defendant Henry Wolfsohn conducts a musical bureau for the purpose of securing concert and recital engagements for high-class artists, which business is owned by his wife, the defendant Paula Wolfsohn, the defendant Henry Wolfsohn acting as her agent, *although said Henry Wolfsohn pretends to be conducting said agency on his own behalf and without disclosing his said wife as principal.*" Here we have a clear and distinct allegation of a fact, namely, that the husband is conducting a certain business as agent for his wife, the business being owned by her. This is an admitted fact that has a

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material bearing upon the construction of the complaint. The truth and the fact being that the husband is conducting the wife's business as her agent, the other words in italics are immaterial, irrelevant or redundant and could be stricken out on motion. So long as the fact was that the husband was the agent of the wife in the conduct of her business it was of no consequence that he pretended to be something else. The husband's pretenses add nothing to, nor do they take anything from, the significance of the conceded fact that he was the agent of his wife, so that we may pass over this paragraph as containing nothing except a very proper allegation that the husband was the business agent of the wife. The redundant words referred to contain no element of a cause of action and may be rejected as the merest surplusage.

The next or third paragraph is one upon which the learned counsel for the demurring defendant has sought to construct a second cause of action, and that reads as follows: "That on or about the 7th day of June, 1901, a contract was entered into between plaintiff and said defendant Henry Wolfsohn, acting as agent for his *undisclosed* principal, Paula Wolfsohn, whereby plaintiff appointed said Henry Wolfsohn his sole manager for America and Canada for a term of one year, agreeing to pay said Wolfsohn 10 per cent. of all plaintiff's engagements, and also agreeing to submit to him all his business communications, and not to accept any engagements without his consent." The argument in support of the demurrer rests entirely upon the use of the single word "*undisclosed*" in the foregoing quotation. If that word is rejected, then the paragraph would contain a plain statement that on a certain day the plaintiff and the husband, acting as agent for his principal, the wife, entered into a certain contract with respect to a certain subject-matter which is more particularly described. It is alleged that whatever contract the husband made, he made it as agent for his wife. That was the capacity in which

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he made the promise and that is the capacity in which the plaintiff accepted it. The word "undisclosed" may be treated as a mere *descriptio personae*, and of no more consequence than if the pleader had described the wife, who was the principal, by any other adjective. The parties to the contract are stated to be the plaintiff on the one part, and the husband, as agent, on the other, and being such agent and carrying on the business for his wife as alleged, he had the power to bind her by the contract and on the face of the complaint she is bound. So it is plain that the second cause of action in this complaint, if there be one, must be built up entirely upon the use of the word "undisclosed," and that I think would be quite too narrow and technical a construction of the language of the complaint.

The learned counsel for the demurring defendant has made an ingenious and refined argument to prove that the agent who concededly acted as agent for his principal in making the contract, at the same time omitted to disclose his principal. If it be true, as alleged, that the husband acted as agent of the wife in making the promise, it must have been accepted by the plaintiff in the character in which it was made, and so it is rather difficult to see how it could be possible that the principal still remained undisclosed. The rule of law applicable to such a case was stated by Judge Martin in *DeRemer v. Brown* (165 N. Y. 419) as follows: "A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as agent." As I understand the rule thus expressed, the agent becomes personally liable when he contracts in his own name without disclosing his principal. But in this case the husband did not contract in his own name. He contracted, if the statement of the complaint be true, as agent for his wife, which necessarily implies that he contracted in her name, and hence the word "un-

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disclosed" cannot be taken to amount to an allegation of a distinct fact, but a general description of the principal for whom the husband was acting generally. In other words, it was a repetition in a very brief form of the redundant words contained in the paragraph first discussed. On a fair analysis of the complaint it comes to this: The pleader attempted in the words quoted to state a verbal contract, not in the precise terms in which it was made, but according to its legal substance and effect, as he might. It is stated that he made the contract as the *agent of his wife*. That allegation, *prima facie*, implies that he made it in her name, and so disclosed his agency and his principal. It is true the wife is described as an undisclosed principal, but this description does not change the substance or legal effect of the allegation any more than if the wife had been described by some other adjective. At most the use of that word amounts to nothing more than to present an inconsistency or a contradiction in terms, and such a defect, if it exists, furnished no basis for a demurrer. There is no allegation of fact in the complaint that the husband in any manner contracted for himself or otherwise than as agent for his wife, or that he omitted to disclose his agency or his principal, and without some distinct allegation of one or more of these facts the court cannot fasten upon a single word descriptive of his wife and seek to construct by some very refined process of argument a contract binding upon the husband. Mere recitals or words of description do not constitute affirmative allegations of fact, such as are required in pleading. There is no allegation in the complaint that the husband ever violated any contract that he ever made otherwise than as the representative of his wife, unless, indeed, there is a joint breach charged, which will be referred to presently. As the argument to sustain the demurrer rests upon the proposition that it appears upon the face of the complaint that at the same moment of time two several contracts were made with the plaintiff, with respect to the same subject-

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matter, one binding the wife alone and the other the husband alone, it is just as essential for the defendants' purpose that the complaint should charge a several breach on the part of both as the making of a several contract, and clearly it does not charge either the one or the other. If the complaint states anything more than a single cause of action for breach of the contract and that against the wife only, it is a single cause of action against the husband and wife jointly, and that theory would be equally fatal to the demurrer.

It was quite possible and competent for the husband when making the contract to bind himself and his wife jointly. In that case there would be but one contract and but one cause of action, and possibly that was the theory upon which the learned counsel for the plaintiff constructed the complaint. It may be that he will not be able to establish such a contract at the trial. But the question here is whether such a contract is not stated on the face of the complaint. After stating the making of the contract as above described, the complaint avers that the *defendants* agreed on their part to arrange a concert tour for the plaintiff, to secure engagements or bookings for him in advance, arrange dates, routes, &c., and do all the preliminary work required of a manager of a high-class artist. Now this amounts to an allegation that the defendants jointly undertook to do what is therein alleged, and that the plaintiff accepted the promise in that character. The contract was a verbal one and an allegation that the defendants agreed to do certain things amounts, or may amount, to a statement of a joint contract. Then again it is alleged that the defendants committed a breach of the contract in refusing to perform its terms and conditions, and have not allowed the plaintiff to do the things which they engaged him for. It is difficult to see how the defendants jointly could have committed a breach of the contract unless they made it in that capacity. Clearly the meeting of minds charged in the complaint was between

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the husband as agent for his wife on the one side, and the plaintiff on the other. As already remarked, the complaint states what took place only in substance and according to its legal effect, and then it proceeds in these words: "Whereby *defendants agreed on their part*," &c. It is then alleged that the defendants refused to make engagements for the plaintiff to sing at concerts and canceled engagements already secured in violation of the agreement. Then it is stated that the defendants induced the plaintiff to pay to them the sum of \$350 to be used in advertising, and that they have refused to account for the expenditure or to return that sum to the plaintiff. This is a distinct allegation of the payment of money to the defendants jointly, which, according to the allegations of the complaint, the plaintiff was entitled to have returned to him. So that upon any view of this pleading there is but one cause of action stated upon a contract either of the wife alone, made by her agent, or by husband and wife jointly. If it is indefinite or uncertain in this respect the remedy to correct it is by motion and not by demurrer.

I have perhaps discussed the question presented by this appeal at greater length than the importance of the question would seem to demand. It is due to the counsel on both sides to say in conclusion that if they had carefully studied how to inject vexatious questions into a very simple case, they could not have met with a greater measure of success than seems to be evidenced by this record. This remark applies equally to the form of the complaint and the form of the demurrer. I think on the whole that the case was properly decided below, and that the order appealed from should be affirmed, with costs in all courts, with leave to the demurring defendant to answer on payment of costs. The question certified should be answered in the negative.

CULLEN, J. (dissenting.)—While special pleading at common law was a marvel of legal accuracy and clearness and had the advantage of presenting for determination by the

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jury sharply defined issues of fact formulated in advance of the trial, still, owing to its technical character, substantial causes of action and defenses were often excluded, and at times a party was defeated, not by the proofs but by the pleadings. To correct these evils the Code introduced a radically different system of pleading, and required a party to state in his complaint only "a plain and concise statement of the facts constituting each cause of action without unnecessary repetition, and the demand of the judgment to which the plaintiff supposes himself entitled." Under the new system pleadings have been construed with great liberality, but manifestly there must be some limit to the application of this rule in order to protect the rights of the adverse party. The great strength of the complaint now before us lies, if I may be pardoned the seeming contradiction, in its weakness, its prolixity and its confusion of expression. It means all things to all men. The judge at Special Term and the majority of the judges in the Appellate Division have held that the complaint states a cause of action on which the defendant Paula Wolfsohn (the wife of the appealing defendant) is liable, because the appellant was her agent in making the contract for the breach of which the action is brought, and on which the appellant is liable, because, though making the contract as an agent, he failed to disclose his principal; and both courts have held that the defendants could be sued in a single action. The question of joinder of parties upon which the decision below proceeded is not passed upon by my associates, some of whom construe the complaint as alleging a joint contract of both defendants, while the prevailing opinion suggests a doubt whether any cause of action is charged against the appellant. Thus the draftsman has formulated a complaint as to the construction of which the courts are not in accord, though all agree the decision should be in his favor. He may succeed on the trial by proving either a joint liability of both defendants or the several liability of the appellant by reason of

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his failure to disclose the name of his principal, though it is yet to be determined whether an agent and an undisclosed principal can be sued in the same action, since that question will not survive the withdrawal of the demurrer. It seems to me, therefore, that the pleader is not justly subject to the criticism passed upon him in the prevailing opinion. How could the most learned, logical and accurate of pleaders have done as well for his client?

Section 484 of the Code of Civil Procedure provides that causes of action can be joined only when, except as otherwise prescribed by law, they affect all the parties to the action. By section 488 a defendant may demur when causes of action have improperly been united. The objection that the causes of action stated do not affect all the defendants is as good a ground for demurrer as the objection that one cause of action is on a contract and another for personal injury (*Nichols v. Drew*, 94 N. Y. 22). I dissent entirely from the proposition "that in order to sustain a demurrer on this ground the complaint must contain two or more causes of action so well stated and so complete and perfect that the court can divide them into the necessary number of actions." If this were the rule of practice the plaintiff would be very foolish to state each cause of action "complete and perfect" when imperfection would avoid a demurrer. But the rule is to the contrary. "If the complaint contains several causes of action improperly united contrary to the Code, as is claimed, the vice may be reached by a demurrer, and the failure of the plaintiff to state them separately and number them would not be an answer to it, nor would a failure to move to correct the complaint in this respect defeat the effect of a demurrer. The plaintiff cannot deprive the defendant of the benefit of a demurrer upon this ground by omitting to number his causes of action. A substantial remedy cannot be prevented by a neglect to observe the rules of practice, nor in a case like this would the defendant be regarded as waiving such remedy by not making

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this motion" (*Goldbery v. Utley*, 60 N. Y. 429; see also *Wiles v. Suydam*, 64 N. Y. 173). As was said by Judge Pryor in *Adams v. Stevens* (7 Misc. Rep. 468) "the demurrer is not obviated by the fact that the several causes of action are indistinguishably blended in a single count or complaint."

We now come to an examination of the allegations of the complaint. It first states that the appellant carried on business ostensibly on his own behalf, but, in fact, as the agent of his wife, and without disclosing his wife as principal; that a contract was entered into between the plaintiff and the appellant "acting as agent of his undisclosed principal, Paula Wolfsohn," whereby the plaintiff appointed the appellant his manager in America for a definite term and "whereby defendants agreed on their part that said Henry Wolfsohn would arrange a concert tour for the plaintiff," &c.; that the plaintiff performed the terms and conditions of said contract on his part; and "that defendants have wholly failed and refused on their part to perform the terms and conditions of the contract above set forth." It is also alleged that the plaintiff paid the defendants a sum of money for which they failed to account. This last states a joint liability on the part of both defendants, but it is plainly a separate cause of action, for the suit is brought chiefly for damages for breach of the contract above recited. It is doubtless true that in a certain sense the breach of the contract declared on gave rise to but a single claim, but it by no means follows that it constituted but a single cause of action. Whether it created more than one cause of action depends on the number of parties liable for the breach and the character of their liability. A single claim even against a single party may give rise to separate causes of action when that claim is sought to be enforced on different grounds. In *Wiles v. Suydam* (64 N. Y. 173) the complaint, in a single count, charged the defendant with liability for a debt of a corporation of which he was both a stockholder and

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trustee, first, because no certificate of full payment of the stock had been filed; second, because no annual report of debts and liabilities had been made. It was held that there were two causes of action charged which under the Code could not be properly joined in the same action. In answer to the contention that because there was but one claim there was only one cause of action, Chief Judge Church said: "I am unable to concur in this view. The recovery of the debt is the object of the action, but a cause of action must have two factors, the right of the plaintiff and the wrong or obligation of the defendant. These must concur to give a cause of action. The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. * * * The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company." Apply that doctrine to the present case. There is but a single contract and a single breach. On that contract the wife is bound because the appellant was, in fact, her agent, and the appellant is liable because he did not disclose his agency and the name of his principal. If we assume that the liability of an agent and that of an undisclosed principal is several and not joint, a proposition I will discuss hereafter, it seems to me beyond question that there are two causes of action stated in the complaint, one against the principal and the other against the agent. With great deference to my associates I am compelled to say that I do not understand the argument that the allegations that the appellant pretended to conduct the business on his own behalf and without disclosing his wife as principal and that the wife was an undisclosed principal are immaterial and may be rejected as surplusage. Doubtless, so far as the

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plaintiff sought to charge the wife they are immaterial, but it must be remembered that the appellant here is not the wife but the husband, and the very life of the charge of liability on his part lies in the allegations referred to. Strike those allegations out and no cause of action is stated against him so far as a breach of the contract is concerned. That the failure of an agent in making a contract to disclose his principal renders him liable on the contract is unquestionable (*De Remer v. Brown*, 165 N. Y. 410). Had the appellant demurred on the ground that the complaint did not state a cause of action these allegations would have been a conclusive answer to his claim, yet now it is proposed to disregard them as surplusage. It is argued that the statement of the complaint that the appellant contracted as agent for his wife necessarily implies that he contracted in her name. It may be a sufficient answer to this to say that the complaint alleges directly to the contrary; that the husband assumed to act in his own behalf, and that the name of the wife was not disclosed. But apart from this, the statement of the complaint imports no such conclusion. Surely, it is possible that an agent may not disclose his principal. Otherwise, if there be no such thing, all books and the decisions have been far astray when discussing the liability of an undisclosed principal and of an agent who fails to disclose his principal. Though an agent does not disclose his principal he does, in law, contract as agent if the other party chooses to look to his principal, and his contract is properly so charged. Nevertheless, at the election of the other party, he may be treated as principal since he has held himself out as such. When, therefore, the complaint charged that the appellant was the agent of his wife it stated a good cause of action against her. When it stated that he failed to disclose his principal it stated a good cause of action against him.

That the liability of an agent of an undisclosed principal and that of his principal are several seems to me very clearly settled by authority. Judge Story, referring to this subject,

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says (Contracts, 266): "But we are not, therefore, to infer that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and agent may both be *severally* liable on the same contract." Mr. Meechem lays down the rule (Agency, sec. 689): "The other party is at liberty on discovering the principal to elect to hold either the agent or the principal, but he cannot hold both." The authorities differ as to what constitutes an election, and in some cases it has even been held that the recovery of a judgment against the agent without satisfaction will not be deemed conclusive of such election. But no authority or text writer gainsays the doctrine that the question is one of election between the two, not of joint liability. So, in *Tuthill v. Wilson* (90 N. Y. 423), it was held by this court through Finch, J.: "The vendor could not enforce his claim against both the principal when discovered and the agents who contracted in his behalf. Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of his agents and yet not their contract, but that of the principal. The vendor had a choice and was put to his election (*Meeker v. Claghorn*, 44 N. Y. 351)."

At common law only parties jointly liable could be sued in the same action. This rule has been modified with us, but only to a certain extent. By section 454 of the Code of Civil Procedure (re-enactment of sec. 120, Code of Procedure, and of provisions of the Revised Statutes) two or more persons severally liable on the same written instrument may be included in the same action as defendants. But the right is strictly confined to the case of a written instrument. This is apparent from the course of legislation. As this section was originally enacted in 1876, it embraced in terms the case of parties "severally liable for the same demand, and, without reckoning offsets or counterclaims in the same

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amount, although upon different instruments." In 1877 the provision last cited was stricken out, leaving it in the form in which it now stands. Under this section it has been held that the maker and guarantor of a promissory note could not be sued in the same action, because the contract of guaranty was separate from the contract imported by the note, and that hence a demurrer lay in each defendant for improper joinder of action (*Barton v. Speis*, 5 Hun, 60). The decision seems to have been accepted as the law in the Supreme Court and generally followed in its decisions. The case of *McLean v. Sexton* (44 App. Div. 520), cited in the opinion in the court below, is not in point. The Code (sec. 339) expressly authorizes joinder in an action to foreclose a mechanic's lien of any person liable for the debt on which the lien is filed. Such an action is similar in character to an action for the foreclosure of a mortgage. There also it is provided by law that any party liable for the debt can be joined as a defendant and a personal judgment for any deficiency recovered against him. Therefore, in such an action, you may sue not only the bondsman, but all persons who, either by guaranty or by subsequent conveyance, have assumed payment of the debt. But in an action at law on the bond itself you can do nothing of the sort.

If, however, we assume that the construction of the complaint adopted by Judge O'Brien is correct, that the contract first declared on is that of the wife alone and that the allegations are insufficient to charge the husband with liability thereon, then it would seem perfectly plain that the demurrer is well founded, for then there are two causes of action stated, one against the wife alone on the original contract, and the second for money paid to the husband and wife jointly. There is but one theory on which it is possible to sustain this complaint, that is that the original contract was not the contract of the wife as principal nor that of the husband as an agent who contracted in his own name or without disclosing his principal, but the joint contract of

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both husband and wife. How this theory can be accepted, in face of the direct allegation that the contract was made by the husband, as agent of the wife, I cannot see.

The interlocutory judgment should be reversed, with costs to the appellant in all the courts, and the action against the appellant severed from that against the other defendant, with leave to the plaintiff to serve an amended complaint in the severed action upon payment of such costs.

PARKER, Ch.J.; BARTLETT, HAIGHT, VANN, JJ. (and WERNER, J., in result), concur with O'BRIEN, J.; CULLEN, J., reads dissenting opinion.

Judgment affirmed.

NOTE—MISJOINDER.

Under section 497 Code of Civil Procedure the court has the power to plead anew and to separate causes of action improperly joined.

Where a note was given in the following form:

"On demand, after thirty days, we promise to pay to the order of John F. Nagel, seven hundred and fifty (\$750.00) dollars. Also to Charles H. Callahan the sum of seven hundred and fifty (\$750.00) dollars with use." Two separate and independent causes of action were created. Nagel v. Lutz, 411 App. Div. 193; S. C., 29 Civ. Pro. 305-314. See note to this case.

So where a separate instrument of guaranty to a lease had been executed. Roehr v. Liebmman, 9 App. Div. 247-249.

But in an action by an owner of abutting property against an elevated railroad company, its receiver in foreclosure proceedings is properly joined, and all those having an interest in the property should be made parties. Woodworth v. Brooklyn E. R., 29 App. Div. 1-3.

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